THE KING
THE CONSTITUTION
THE EMPIRE
AND
FOREIGN AFFAIRS

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LETTERS AND ESSAYS

1936–7

BY

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IN MEMORIAM

MARGARET BALFOUR KEITH

PREFACE

In this volume I have dealt with the royal abdication and its grave effects on the unity of the Crown, attested by South African legislation and the Constitution of Eire; with certain anomalies in the Regency Act and the Coronation Oath; with Irish and South African hostility to British nationality, and the demand of the Union for the rights of neutrality and secession, and for the transfer of the Native Territories; with the recent growth of Canadian resentment of the appeal to the Privy Council; and with the negations of the Imperial Conference. I have discussed also Mr. Baldwin's notable contributions to the aggrandizement of the Prime Minister at the cost of the King and the Commons alike; the errors which hampered the inauguration of responsible government in India, and played into the hands of Congress; and the new status of Burma in the Empire.

In foreign affairs I have noted the progressive abandonment of our obligations to Ethiopia; the fatal objection on Imperial grounds to any effort to strengthen the League or to establish collective security; our resolute negation of German aspirations for oversea expansion; the doctrines of non-intervention and belligerency in regard to the Spanish Civil war; the Italian bid for mastery of the Mediterranean with the aid of a Fascist Spain; and, thence arising, the King's disclaimer of that sovereignty over the Sudan which Lord Kitchener's conquest acquired for Queen Victoria.

My best thanks are due to the Editors of the *Scotsman*, *Manchester Guardian*, *Spectator*, *Morning Post*,

and *Irish Independent* for their courtesy in permitting the use of the communications which appeared in their journals, and to my sister, Mrs. Frank Dewar, for her unflagging interest in these topics.

A. BERRIEDALE KEITH.

UNIVERSITY OF EDINBURGH,
21 September 1937.

CONTENTS

I. THE KING, THE CONSTITUTION, AND THE EMPIRE

(*a*) *The Abdication, the Regency Act, and the Coronation Oath*

(*b*) *The King, the Prime Minister, and the Commonwealth*

(*c*) *British Relations with the Irish Free State*

(*d*) *British Relations with the Union of South Africa*

I

THE KING THE CONSTITUTION AND THE EMPIRE

(*a*) THE ABDICATION, THE REGENCY ACT, AND THE CORONATION OATH

1. THE MARRIAGE OF THE SOVEREIGN

MANCHESTER GUARDIAN, *4 December, 1936*

It is a characteristic feature of English common law that in the matter of marriage it knows no distinction of ranks. In its eyes all persons from the sovereign downwards stand on the same footing, and the reigning prince may marry whom he pleases in exactly the same way as any of his subjects, subject to precisely the same conditions regarding prohibited degrees of relationship.

Statute, however, has intervened to impose a vital restriction. The misdeeds of James II drove Parliament to determine that, while the King may marry a Papist—that is, one who holds communion with the Church of Rome or professes the Popish religion—by this act he is excluded from enjoying the Crown, the people are absolved of their allegiance, and the Crown descends to the next Protestant in the line of succession. It will be noted that the sanctity of marriage is respected. The marriage is not invalid nor is it even wrongful. A sovereign may deliberately prefer domestic happiness to the cares of State, and the statute provides a constitutional means of doing so.

The unfettered choice of the sovereign stands in marked contrast with the position of the other members of the Royal Family. To them, indeed, was originally applicable the freedom of the common law, but it is characteristic of the un-English point of view of the first sovereign of the Hanoverian dynasty that, acting in accordance with the practice of German princely families, he was eager to assert authority over the marriages of members of the Royal Family.

Precedents of earlier action in this sense were asserted, and the judges in 1717 ruled, as desired by the King, that he had the right to approve the marriages of the heir-presumptive and his grandchildren. But a marriage entered into without royal approbation was not invalid in law, and the indignation felt by George III at the marriages of the Dukes of Cumberland and Gloucester induced him, by the exertion of vehement pressure on the Houses of Parliament, to secure the passing of the Royal Marriages Act, 1772. Under this remarkable enactment the permission of the King is necessary for the validity in English law of the marriage of any descendant of George II (other than the issue of princesses who marry into foreign families) under the age of twenty-five. Over that age, if the royal permission is withheld, the person concerned may give notice of his intention to marry to the Privy Council, and may after twelve months have expired marry, unless in the interval both Houses of Parliament have expressed disapproval of the projected alliance. Whether the Act in its wide extension is now defensible may be doubted, but normally, of course, it operates to secure that on ascending the throne the sovereign is already married with the approval of his predecessor.

The complete freedom of the sovereign to marry at pleasure is not restricted by any constitutional practice. No doubt under the earlier sovereigns of the present dynasty the feeling was strong that royalty should mate with royalty, but it cannot be said that there ever existed any marked popular sentiment on the subject. When Queen Victoria cordially approved the marriage of her daughter to the Marquis of Lorne, the warm approval shown by Parliament made

it clear that the country was willing to accept any alliance on its merits. Under earlier dynasties, of course, no restrictions on the royal freedom of choice were enforced. Henry VIII's assertion of his sole decision was readily accepted by his subjects, and those of his marriages which were based on international interests were no more successful than those of Charles II and his brother, while that of his daughter was disastrous.

The days fortunately have gone when it was necessary for a Queen like Elizabeth to consider whether duty to her country did not demand a political marriage to the Duke of Anjou. No Ministry now need consider itself bound to advise the sovereign to strengthen the country by a prudent alliance. But the freedom of action of the sovereign is limited by moral factors of a compelling character. The position of a Queen or Prince Consort is one hard to fill under the exacting conditions of a monarchy which rests on the popular will, and a specially high standard has been set by the precedents of Prince Albert, of Queen Alexandra, and of Queen Mary. Qualities which may be admirable for the normal life of the subject may be insufficient for the exacting round of public duties imposed by custom on a Queen. The mere fact that the sovereign may legally wed whom he will imposes on him the task of fixing his affections on one whose selection will be widely welcomed by his people.

In such a matter the position of the Prime Minister as representing the Cabinet is one of the utmost delicacy. He cannot claim a constitutional right to advise marriage, still less to suggest any particular marriage. The King's sole right to determine for himself the desirability of marriage is as uncontestable as his initiative in choice. But before any final decision

is taken the sovereign should doubtless take his Prime Minister, as the essential link between him and his people, into his confidence. Nor would it involve any overstepping of the limits of his authority were the Prime Minister in his confidential intercourse with his sovereign on his own initiative to touch on the attitude of the people to any suggested marriage. He must, of course, in any case make certain that any proposed consort is not a Papist and is under English law of the status of an unmarried woman, for English law differs on that head often from foreign law, and authoritative advice is due to the King.[1] On the desirability of any particular choice the Prime Minister would doubtless, if at all possible, concur in the royal wish. But constitutionally he would be entitled, if his view were overruled, to resign office, for it is impossible to accept the suggestion that a royal marriage is to be regarded as a private affair, in which Ministers have no place. The office of Queen Consort is of high official rank, and in the selection of its holder the people and their representatives have a vital interest.

Nor is the duty of the Crown to keep in touch with

[1] English law treats as valid divorces granted by the Court of the husband's domicile, but it seems that the first divorce of the lady in question was granted in Virginia, which was not the State of domicile of the husband. There is one doubtful authority (*Armitage* v. *Att.-Gen.*, [1906] P. 135) in favour of the view that a divorce may be recognized in England, if the Courts of the domicile at the time would have recognized it. The matter might, I suggested to Mr. Baldwin, be cleared up by judicial decision in an intervention in the English divorce proceedings, or by reference to the Privy Council under the Judicial Committee Act, 1833, so that legislation might establish the position, if doubtful. The case cited was one where the American divorce was granted in a defended suit unlike the present case, and this fact might have been decisive (*The Scotsman*, 22 March; 21, 26, 29 April 1937). Nothing was done, but by letters patent of 27 May the title of Royal Highness, continued to the Duke of Windsor, was denied, not only as was proper to his issue, but also to his wife.

the views of the Cabinet lessened by the fact that Parliament in its grant of the Civil List, making ample provision for the contingency of the royal marriage, has deprived itself of any formal means of control. It was constitutionally open to the House of Commons to reserve to itself the right to determine the grant for the Queen Consort when the choice of the King was communicated by him. The fact that it has refrained from such action is a signal proof of the complete confidence which it reposes in the discretion of the King and the respect which he will accord to its point of view. No more signal example could be given of the completeness of the bond of confidence between King and people.

2. THE ABDICATION OF THE THRONE

MANCHESTER GUARDIAN, *7 December 1936*

It is one of the special characteristics of the Imperial Crown that it has never voluntarily been laid aside by any of those who have worn it. It is true that Edward II and Richard II were compelled by their opponents to resign, and that James II was treated by a legal fiction as having abdicated; but in all three cases it was the decision of Parliament which vacated the throne. There is therefore no precedent for voluntary abdication, and the legal effect of such action must be regarded as doubtful. It may be argued, from the analogy of the inability of a peer to surrender his peerage, that the King cannot legally abdicate, so as to deprive himself of his royal rank or his issue of their right to the succession. A King, it may be contended, may refuse to perform the functions of his office, but in that case the throne is not vacant. The position is

merely similar to those cases where from mental infirmity or physical weakness the sovereign cannot act, and provision has to be made by Parliament for the performance of his duties. The point is not of essential importance. It is clear that any abdication would have to be sanctioned by Act of Parliament, which would also provide for the exclusion from the succession of any issue of the sovereign who abdicated, and determine his property rights. The Civil List would have to be revised, a suitable allowance awarded to the ex-King, and very probably steps taken to adjust property rights, for it may be assumed that the King holds property which has accrued to him from dispositions made on the assumption that he will continue in the royal office.[1]

Though unique, the passing of such an Act would not involve any serious constitutional issue for the United Kingdom, the assumption being that the measure was passed at the request of the King, and that he would afford it automatically his assent. It would, of course, be necessary to be assured of the acceptance of the premature succession by the Duke of York, but doubtless that would follow automatically from a voluntary abdication. The legislation would have full effect both legally and constitutionally throughout India, the colonial Empire, and the dependencies of the Crown. But the position assigned to the Dominions by the Imperial Conference of 1926 and more formally by the Statute of Westminster 1931 raises very serious difficulties.

The Statute, passed at a time when such a contingency as a voluntary abdication was unthinkable,

[1] This issue was evaded by dropping any allowance and adjusting the issue privately.

provided that 'any alteration in the law touching the succession to the throne or the royal style and titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom'. But the provision is placed in the preamble only as a declaration of constitutional propriety, not of formal law; and in law, strictly speaking, the alteration of the succession, which would necessarily be involved in the Act dealing with the abdication, would be automatically effective in all the Dominions, without the expression of the assent of their Parliaments. This follows from the definitions of the term 'Queen' in the British North America Act, 1867, and in the Commonwealth of Australia Constitution Act, 1900, from the terms of the Status of the Union Act, 1934, of the Union Parliament, and from the Interpretation and other Acts and common law in the case of New Zealand, Newfoundland, and the Irish Free State. But legal power and constitutional right are very different things, and it would be imperative to insert in any British Act dealing with the issue, if so desired by any Dominion, an express declaration that the change in the succession should have no application to that Dominion, unless and until the Parliament of that Dominion either assented to it or made legislative provision of its own.

The position of the Dominions in this matter is not uniform, a fact which in part accounts for the rather curious wording of the provisions of the Statute of Westminster. Canada and the Commonwealth of Australia have constitutions which contain no grant of federal power to legislate regarding the succession to the Crown, and therefore all that can be done by their Parliaments is to express assent under the

preamble of the Statute of Westminster, which must be understood in the sense that, whatever the legal powers of a Dominion Parliament, it would be constitutional for it to express in such a matter its assent to a change to be effected by British legislation. In the case of Newfoundland the suspension of the Constitution would render the legislation of the United Kingdom the sole and the proper method of expressing the Dominion's acceptance of the new régime. The Union of South Africa, on the other hand, has clearly asserted its absolute right to determine the issue of sovereignty under the Status of the Union Act, 1934, and legislation of an independent character would assuredly be deemed essential in order to maintain the constitutional rights of the Union. New Zealand has never asserted any legal right to determine the succession, and it may well be that she would be contented to express assent to any British legislation.

The position of the Irish Free State, on the other hand, presents very grave difficulties. The State tacitly acquiesced in the accession of Edward VIII, but it is impossible to say that it would be willing to follow the lead of the British Parliament in an alteration of the succession, having regard to the advantageous position which it might secure by declining to concur in British action. If then Britain proceeded to legislate, it would be open to the State to point out that such action without the assent of the State was a violation of the constitutional position as defined by the Statute of Westminster, and that the State must insist on its right in the circumstances to determine for itself the question of the sovereign authority. It might then vest it in an elected head of the State, thus terminating the connexion of the State with the British Common-

wealth. Such legislation, it must be remembered, would not be subject to the control of the Privy Council, for that body in its own decision in *Moore* v. *Attorney-General for the Irish Free State* (1935 A.C. 484) has declared valid the Irish Act abolishing the appeal to the Privy Council, and it may well be that even in the eyes of English law such legislation would be valid, for in that judgement the Privy Council seems to have conceded the right of the Free State Parliament to legislate subject to no restriction whatever, that is, with the same plenitude of authority as is unquestionably possessed by the Parliament of the United Kingdom and as is claimed, probably justly,[1] by the Parliament of the Union of South Africa. It is plain, therefore, that abdication must necessarily involve among other dangers that of raising in an acute form the question of the secession of the Irish Free State from the Commonwealth.[2]

3. THE STATUTE OF ABDICATION

To the Editor of THE SCOTSMAN, *10 December 1936*

1. In order to give immediate effect to His Majesty's abdication it has been necessary to depart from the exact terms, but not from the principles, of the Statute of Westminster, 1931. There is no time to secure the assent of all the Dominion Parliaments as contemplated in the preamble to that Statute, but the assent of the Dominion Governments supplies full authority

[1] This view has since been taken by the Appellate Division of the Supreme Court in *Ndlwana* v. *Minister of the Interior* which denies the right to question on the ground of informality in passing any Union Act (cf. Ridges, *Const. Law of England* (ed. Keith, 1937), p. 4).

[2] These views were by request of the National Broadcasting Company of America broadcast from Edinburgh on December 8.

for the measure taken under the principles of the Constitution.

2. The legal effect of the Statute of Abdication is secured in the several Dominions as follows: In Canada it becomes automatically operative under s. 3 of the British North America Act, 1867. In Australia it has the same effect under s. 2 of the Commonwealth of Australia Constitution Act, 1900, and in the Union of South Africa under the Status of the Union Act, 1934, s. 5. The same result follows in India and in New Zealand, as well as in the rest of the Empire, under the common law and the Interpretation Acts of the United Kingdom and these territories.

3. There is no possibility of any difficulty in the Union. It is true that no British Act can there take effect now until extended thereto by the Union Parliament, in view of the express provisions of s. 2 of the Status of the Union Act, but the matter is completely covered by the definition of 'heirs and successors' to the Throne under s. 5 of that Act. It is not necessary, therefore, that any action be forthwith taken by Parliament in the Union, though later it will no doubt homologate the assent of the Union Government.[1]

4. In the case of the Irish Free State the position is different, and it can hardly be expected that the Dail

[1] Though the legal position is clear, General Hertzog invented the quite untenable theory that the royal abdication took effect on December 10, and explained his telegram of December 11 to the King *eo nomine* as due to courtesy. Plainly, the whole idea was due to the determination to prove to the whole world that the Kingship of the Union and that of the United Kingdom were separable. Cf. no. 18, *post*. The wording of the proclamation of the King on December 12 was widely regarded as chosen to make it clear that his succession was as King of South Africa; see the argument in *R.* v. *Roux*, [1936] A.D. at p. 272. One point involved in that accusation of the *crimen laesae venerationis* was whether the attack complained of was justiciable as an attack on the sovereign of South Africa. Cf. Keith, *Journ. Comp. Leg.* xviii. 285, 286.

will not take advantage of the present unquestionable opportunity to deal with the relations of the State and the Crown.[1]

4. SIR JOHN SIMON ON THE REGENCY BILL

To the Editor of THE SCOTSMAN, *3 February 1937*

Sir John Simon, I fear, is more diplomatic than accurate in his exposition of the position of the Dominions in regard to the Regency Bill. It may, therefore, be worth while setting it out with greater precision.

1. In the Irish Free State there now exists statutory provision for the performance of certain royal acts by the present sovereign. Nothing but Irish legislation can authorize any person to act in lieu of the sovereign, but the Free State has no immediate intention of legislating on this point alone. We must wait for the new Constitution to see if the royal powers are conferred on the proposed new head of the State.

2. In the Union of South Africa the Governor-General can exercise every royal function, including that of treaty-making and declaring war or neutrality. No legislation, therefore, is necessary or contemplated, for the time being at least.

3. As regards Australia and New Zealand, Sir John Simon is entirely misleading. By saying that the Bill when it became an Act would be effective in the United Kingdom and the Colonies, he suggests that it would not take effect in these Dominions. If this is his meaning, then he is clearly in error. The Bill as introduced is unlimited in operation, and it extends, therefore, to the whole of the Dominions of the Crown except in so far as its operation is limited by statute. Its operation,

[1] See nos. 14 and 17, *post*; *Journ. Comp. Leg.* xix. 105 ff.

therefore, is excluded only in Canada, the Irish Free State, and the Union of South Africa, to which alone is s. 4 of the Statute of Westminster applicable. It may be added that, as matters stand, neither Australia, whether Commonwealth or States, nor New Zealand can legislate to affect the Regency Act.

4. As regards Canada, the position is frankly obscure and unsatisfactory. The Act will not be in force as part of the law of the Dominion because Canada has not requested, and consented to, its enactment. Will then a treaty affecting Canada be validly concluded, if it has to be signed and ratified under authority granted by the Regent? The case of action by Counsellors of State is less difficult, because it may well be that by the common law affecting the Crown, which remains part of the law of Canada, their appointment could be held valid, without regard to the Regency Act. Sir John Simon talks of Dominion legislation as possible. But has he forgotten the limitations on the power of the Parliament of Canada under the British North America Act, 1867, which are expressly preserved by s. 7 of the Statute of Westminster, 1931, or the emphatic reminder[1] just given by the Privy Council that five important Canadian Acts are invalid because they transgress the limits set by the Constitution? Would it be possible to find any authority in law for the Dominion or the Provinces, even if they all acted together, to authorize a Regency? It is, in my opinion, most unfortunate that Canada was not asked to request and consent to the enactment of the Act, and even now this step might properly be taken. It is difficult to see how Canada could object, for royal acts are simply carried out on the initiative of her Government.

[1] See Keith, *Canadian Bar Review*, xv. 428–35, and no. 31, *post*.

5. The Act will apply to Newfoundland, whether or not she resumes full Dominion status.

6. Apart from the question of the Dominions, is it really desirable that the person next in succession to the Throne should be among those empowered to certify the physical or mental incapacity of the sovereign? He would thus help to secure his own position as Regent, and, where the issue was in doubt, as in the case of mental affliction, his position would be extremely invidious. If he certified, he might be censured by public opinion as moved by personal ambition; if he refused, it might be said that he did not believe in the royal incapacity. On general principles surely he ought to be omitted, and the decision left essentially to the high judicial officers mentioned or any three of them. In that case the alteration of the number required to certify might be avoided.

5. THE REGENCY BILL; AMENDMENTS DESIRABLE

To the Editor of THE SCOTSMAN, *6 February 1937*

As, thanks to the hospitality of your columns, a useful amendment, suggested in my letter in your issue of the 4th instant,[1] has been made, without a division in the House of Commons, by omitting the next in succession from the list of those qualified to certify the incapacity of the sovereign in the Regency Bill, may I trouble you with a further suggestion, on the chance that it may be considered in the House of Lords?

In Clause 3 Sir John Simon accepted an amendment which provides that 'a person shall be disqualified from becoming or being Regent if he is not a British

[1] See no. 4, *ante*.

subject and *domiciled in some part of* the United Kingdom'. The original text read for the words italicized 'resident in', and the meaning was obviously that the Regent should be a person who was identified with this country by residence. It was suggested that the person next in succession might be acting as a Governor-General, and so might be regarded as ineligible, because not resident, when the occasion arose, and so the change was made. But it was not noted that the change leaves possible the office of Regent devolving on some person who, though technically domiciled in some part of the United Kingdom, nevertheless is on unsatisfactory terms with the royal house or dislikes the United Kingdom, and therefore manifestly is not suited to be Regent. The obvious correction was to insert 'normally' before 'resident', which would cover every case, and would secure that the Regent was a person identified with British life and interests. It seems most desirable that the change made should be thus rectified, for the Act is permanent, and its terms should be very carefully chosen.

But a further point arises. Is it wise to omit provision for the case where the person who should be Regent was unwilling to act? It is impossible to force a reluctant or absent prince to assume the office of Regent, and I think specific provision should be made, which could be easily done in s. 3. If a Regency should become necessary it would be gravely embarrassing if the Regent by law were to refuse to act, and we should have all the difficulties of 1788 once more,[1] for in that case there would be no sovereign able to assent to the Bill necessary for transferring the Regency. It would be infinitely simpler to allow refusal.

[1] See Keith, *The King and the Imperial Crown*, pp. 46, 47.

6. THE REGENCY ACT, 1937: A CRITICISM

24 March 1937

The Regency Act in its final form is marked by grave defects which are the more remarkable because, though the Dominion Governments did not formally participate in its drafting, the Bill was shown to them during their presence in London in 1935 and they acquiesced in its enactment.

1. Though the remarkable error by which a body of six persons was constituted with power to declare the royal incapacity, including the prospective Regent, was corrected by Sir John Simon's acceptance from Mr. Mander, M.P., of the amendment suggested by me, Sir J. Simon persisted in making one qualification of the Regent domicile in some part of the United Kingdom. This decision is inexplicable, because the whole intention of the reference to residence in the original form of the Bill was to secure that the Regent should be a person who was essentially connected with the United Kingdom in the sense of having his regular home there. Domicile, of course, produces no such result. The very sort of person whom it might be desirable to exclude from the Regency, a dissatisfied prince who lived abroad, might easily be domiciled in England. It seems to have been forgotten by Sir J. Simon that such a prince would almost certainly have a domicile of origin in some part of the United Kingdom, and the loss of such a domicile is difficult to prove. But in any case it was inexcusable to set a problem in a peculiarly unsatisfactory branch of law to be solved, when a vital issue of the appointment of a Regent is concerned. It seems to have been forgotten that the validity of any action done by the Regent

personally might be challenged on the score that he was not legally Regent. Common sense would have dictated the acceptance of the simple suggestion 'normally resident' in lieu of 'domiciled'. Unhappily, it appears to have been thought that 'normally domiciled' was the term proposed, though of course from the legal point of view 'normally domiciled' is a monstrosity and a contradiction in terms, for a person is either domiciled, or not, absolutely; there is no half-way house.[1]

2. But the worst feature of this unhappy provision arises from the provisions of s. 6 (2) regarding the qualifications of the Counsellors of State. They may not include any person who is disqualified from being Regent, so that all four must be domiciled in some part of the United Kingdom. Here again it will be necessary to determine for each counsellor the question of domicile, and here again the aim of shutting out a prince habitually resident abroad is completely defeated. Seldom can an Act sponsored by so distinguished a lawyer have suffered from so grave a defect, destructive of its express intention of certainty and simplicity.

3. It must be questioned also whether it was wise to define rigidly the Counsellors of State. As the Dominions preferred that no British Ministers should be included in the Counsellors, the choice might have been limited to those in the succession to the throne, but the King should have been allowed full discretion as to number and personnel. No reason for the limitation of a satisfactory character has been adduced, and it must be admitted that the discussion of the measure in both Houses of Parliament fell short of the impor-

[1] Dicey and Keith, *Conflict of Laws* (1932), pp. 75 ff.

tance of the topic. The Government, it was obvious, was anxious to deal swiftly with the topic lest difficulties with the Dominions might be created, and hasty work is seldom satisfactory.

4. But, even so, a very serious change was made in s. 2 (1) regarding the cases in which a regency might be brought into being. There was added authority to the qualified persons (the wife or husband of the sovereign, the Lord Chancellor, the Speaker, the Master of the Rolls, and the Lord Chief Justice) or to three of them to declare 'that they are satisfied by evidence that the sovereign is for some definite cause not available for the performance of' the royal functions, whereupon the Regent assumes power. Lord Rankeillour was in some degree responsible for this change, as he pressed on Ministers the possibility that the King might be taken prisoner on the sudden outbreak of hostilities when abroad, or might be prevented from returning to England, and Ministers evidently thought these wide terms would cover the case. They are applied also to the Regent by s. 3 (5) of the Act, and therefore meet the suggestion, pressed by the writer,[1] that provision ought to be made to meet the case where a person who became Regent by operation of law refused to act, thus causing a deadlock. But the cases of the King and the Regent are very different, and the Act provides a possibility that, if the King desired to abdicate or refused to act in accordance with the wishes of Ministers, he might be treated simply as not available for the performance of duties, and a Regent be installed in his place. Since, in the view of the Union of South Africa, a King has absolute right to abdicate, and his abdication becomes effective

[1] See no. 5, *ante*.

forthwith on declaration, there would thus be a disruption of the unity of the Crown such as it is.

5. As regards the Dominions, Mr. Mander elicited from the Attorney-General that Sir John Simon's attitude was that it was not desirable to make any statement as to whether the Act applied to them or not. The amazing thing is that this statement was placidly accepted in the Commons, and that in the House of Lords no peer was willing to raise the point. We have thus the spectacle of the Imperial Parliament legislating in deliberate ignorance of whether it was legislating or not for the Dominions. No more amazing example of executive control of the legislature can well be imagined, for not a word of protest was said.

6. In fact, of course, the Act binds Australia, Commonwealth and States alike, New Zealand, and all the Empire save Canada, the Union of South Africa, and the Irish Free State. Of the latter two nothing need be said, since as sovereign legislatures they can enact what they will if need of a Regent arises. But there is no evidence that Canada has any authority to provide for a Regent, for that would involve an amendment of the British North America Act, 1867, which is *ultra vires* the Parliament under the express terms of the Statute of Westminster, 1931, s. 7. It is decidedly unfortunate therefore that Canada did not request and consent to the enactment of the Act for the Dominion and the Provinces. What the legal position would be if a regency became necessary it is difficult to say, but no doubt hasty legislation to clear up the position would be urgently required.

7. The provision by statute regarding Counsellors of State seems from the Dominion standpoint singularly unfortunate. It is difficult to doubt that before

the provision was made the King had by the royal prerogative power to appoint Counsellors to act for him, just as he from time to time had authorized the Prince of Wales to hold councils for him and to express thereat the royal will.[1] But the statutory provision introduces confusion and doubt. Does it take away the prerogative right as regards those Dominions not affected by the statute, or does that remain? Why such legislation should have been decided upon it is difficult to say. But it is natural to feel that if any action were felt necessary, it should have been held over until some common Dominion assent to legislation covering the whole of the Empire could have been attained. As it is, it seems as if the Dominions had looked on the whole business with complete lack of enthusiasm, probably feeling, very much as do others outside governmental circles, that no real case for legislation had been made out at all beyond the simpler type of the older Regency Acts, and that legislation for Counsellors of State was a definite blunder.

7. THE NEW FORM OF THE CORONATION OATH

To the Editor of THE SCOTSMAN, *16 February 1937*

1. May I express the hope that Sir John Simon may be induced to explain to us the character of the new oath which His Majesty is to take in respect of the Union of South Africa and the other Dominions, and the relation which it will bear to the Act for establishing the Coronation Oath (I Will. and Mary, c. 6), which must be administered to the King at the Coronation under the terms of the Act of Settlement under which His Majesty holds the Throne?

[1] Keith, *The King and the Imperial Crown* (1936), p. 44.

2. It is true that, when Mr. Mander, in the House of Commons on the 4th instant, called attention to the views which I had expressed in a letter[1] published in your columns on that date regarding the effect of the Regency Bill in the Dominions, the Attorney-General took refuge in the really amazing doctrine that it was not desirable in the United Kingdom for the Government to make statements on the subject. I know of no more remarkable or intolerable claim than that the Houses of Parliament are to pass a law without knowing whether or not they are legislating for the Dominions. It may be that they will yield to this autocratic assertion of the paramount control of the Executive, but if so they are stultifying themselves. But at any rate in this case Ministers are surely bound to let us know to what they have agreed regarding the oath, so that we can see for ourselves, even if they will not tell us, how far it is consistent with the existing law.

3. If there is any discrepancy between the new move and the existing legislation,[2] then let us have legislation forthwith, and let us avoid any doubt as to the strict compliance by His Majesty with the terms of the Act which entitles him to the Throne. We are all willing

[1] See no. 4, *ante*.

[2] I had suggested (*Journ. Comp. Leg.* xviii. 277) that the King should swear 'to govern the United Kingdom of Great Britain and Northern Ireland, the British Dominions beyond the Seas, and India according to their respective laws and customs'. This would have had the advantage of recognizing Northern Ireland. The new form refers to 'the peoples of Great Britain, Ireland, Canada, Australia, New Zealand, and the Union of South Africa, of your possessions, and the other territories to any of them belonging or pertaining, and of your Empire of India'. Mr. de Valera appears to have acquiesced in the mention of Ireland, presumably to prevent that of Northern Ireland as implying continued partition. The republicans naturally protested at his surrender, which in fact does mark the State as still part of the dominions of the Crown and gives its people at least outside the State British nationality, which his new Constitution does not touch. See no. 10, *post*.

that the religious feelings of South Africans and other Dominion nationals should be respected, and it may well be that the references to the Church of England in the present form of oath should be revised. But let it be done with due publicity and open discussion in Parliament.

4. The Dominion party is, of course, right in holding that the action of South Africa is dictated by the desire of General Hertzog to emphasize the divisibility of the Crown, which carries with it the rights of secession and neutrality. It vainly pleaded with him to accept December 11 as the date of the Royal abdication, but the Prime Minister insisted on the 10th, so that students of constitutional anomalies may record that King Edward VIII ceased to be King in the Union on December 10, in the Irish Free State on the 12th, and elsewhere on the 11th. The Union Parliament has, very graciously, been pleased to ratify everything done by the late King after the 10th, so that we need not fear that after all his assent to the Imperial Act on the 11th was a nullity and the Act void.[1] Such hair-splitting can hardly serve any useful purpose.

8. THE CORONATION OATH; ITS ILLEGALITY

To the Editor of THE SCOTSMAN, *5 April 1937*

In view of the official publication of the Coronation service, and of the inquiries I have received and made since the publication of my letter questioning the legality of the Royal Oath, may I explain more fully the grounds why I hold it clearly illegal for the King to take the new form of oath without sanction of Parliament?

[1] See no. 10, *post*.

1. His Majesty's sole right to the Throne depends on the Act of Settlement, which imposes on him the obligation to take the oath prescribed by I William and Mary, c. 6. That oath has been taken by all his Royal predecessors, including his own father, and departure from it can be justified only by statute, and no such justification is available.

2. The oath in its former shape required the King to 'swear to govern the people of this United Kingdom of Great Britain and Ireland and the Dominions thereto belonging, according to the statutes in Parliament agreed on and the respective laws and customs of the same'. Its purpose was clear, and was stressed in the controversy with the American colonies: it emphasized the dependence of the Dominions, and the supremacy of Parliament. The new form abolishes these points. But the Statute of Westminster is no justification in law for the change. (*a*) It has never been adopted by Australia or New Zealand, and as regards these Dominions the position is in law precisely as it was when George V swore the oath. (*b*) Under the Statute itself, the British North America Acts, Imperial statutes, are the fundamental basis of the Constitution, and Canada has just recognized the continued supremacy of the Imperial Parliament by her acceptance of the application to that Dominion of His Majesty's Declaration of Abdication Act, 1936. (*c*) In the case of Ireland, the change can be justified on the theory that it accords with the alteration in the Royal style made under the Royal and Parliamentary Titles Act, 1927, that is, by an express Imperial statute. (*d*) In that of the Union of South Africa, to which the Statute of Westminster applies, we have the Union Act just passed authorizing the new form of oath. For

one Dominion there is statutory authority for the change; Ireland is defensible as an ingenious evasion; but for the other three Dominions there is no shred of authority, and the change is patently illegal.

3. Even more flagrant is the illegality of the limitation to the United Kingdom of the Royal obligation to maintain the Protestant Reformed religion. The application of the oath to the whole of the Empire was deliberate—it has been recognized for over two centuries—and to alter the oath now, without legal authority, however innocuous the change may be, is indefensible. No one can pretend that the Statute of Westminster affects that issue.

4. If the advice of the Law Officers is relied on, I have merely to point out that it is quite insufficient. The proper course is to ask the Judicial Committee of the Privy Council, under s. 4 of the Act of 1833, for its opinion, and the fact that this simple and rapid procedure has been omitted naturally suggests consciousness on the part of the Government that their position is untenable, and that a short Act is urgently necessary. It is relevant to note (*a*) that on March 22 Mr. Justice Bennett[1] distinctly intimated his opinion, against that of the Attorney-General, that the Government was violating in one respect the Bill of Rights; and (*b*) that it is admitted that the Government suggested to General Hertzog, who flatly refused the proposal, that he should accept Imperial legislation for the Union though that was illegal under the Status of the Union Act, 1934.

5. It is not a matter of indifference that the

[1] As regards the action of the Inland Revenue authorities in remitting tax without clear statutory sanction, i.e. exercising the dispensing power, see *The Income-Tax Payer*, xiv. 65.

Sovereign should be advised to break the law in the very moment of swearing to govern according to it. It strikes at the root of respect for the law and the Crown. That the Archbishop should administer an illegal oath is also regrettable, but dignitaries of that Church have so long in their own affairs[1] defied the laws binding on them that respect for law in general need hardly be expected.

9. MINISTERIAL VIOLATION OF LAW IN THE CORONATION OATH CHANGES

To the Editor of THE SCOTSMAN, *16 April 1937*

May I state finally, with reference to my letter in your issue of April 6, the result of my investigation of the validity of the changes made in the Coronation Oath without Parliamentary sanction?

1. His Majesty's Government believe the changes valid, but will not ask the Privy Council to pronounce on their belief. They are doubtless wise in not doing so. The last occasion when the Government formally asserted through Lord Hailsham an opinion on a legal issue was when it denied the right of the Irish Free State to abolish the right of appeal to the Privy Council.[2] But neither Lord Hailsham's authority nor the elaborate argument of Sir Thomas Inskip deterred the Privy Council in holding in *Moore* v. *Att.-Gen. for Irish Free State* (1935 A.C. 484) that the Irish Free State had an unquestioned right to do so.

2. Why a Government in control of a loyal majority

[1] Cf. Dugdale, *Arthur James Balfour*, i. 275–85. The result is inevitably the steady decline in the moral influence of the Church, and the deterioration of its personnel.

[2] For his view see *Journ. Comp. Leg.* xvi. 139, and for my view in favour of the right to abolish, ibid. 137, 138.

in both Houses should resort to executive action instead of seeking Parliamentary sanction, I do not understand. There is, of course, a blunder in the form of the Oath, which is avoided in the oath prescribed for the Regent by the Regency Act, 1937. The Regent swears to maintain in England and in Scotland the settlement of the true Protestant religion as established by law, while the Coronation Oath refers to the United Kingdom, ignoring the fact that neither in Wales nor in Northern Ireland is there any Established Church. Welsh Nationalists or Northern Irish Presbyterians might possibly have raised the point, and that would have been all to the good, as the discrepancy between the two oaths is wholly indefensible.

3. Mr. Baldwin has just made an eloquent plea for respect for the Constitution. But the historian must note that his practice has fallen short of his precept, not merely in this very serious matter of the Royal Oath, but also in the most strained interpretation given to the Treaty of Peace Act, 1919, when in October 1935 he used it to carry out sanctions against Italy, a purpose never contemplated when the Act was passed.[1] He has given precedents for the extension of the Royal prerogative and of statutory executive authority, which are viewed with much satisfaction by the Labour Party, whose programme for the overthrow of capitalism includes the use forthwith of the prerogative to destroy resistance by the House of Lords, and the nationalization of industry by Orders in Council immune from judicial control. For a Conservative Ministry to strain the Constitution merely to save time in Parliament is wholly unwise, and it is particularly

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 145–8.

unjustifiable when it places His Majesty in the unedifying position of violating, in changing the form of the oath, the law to which he is subject. If His Majesty can dispense himself from one part of the law, he can do so from any other, and the safeguards of the Act of Settlement can become waste-paper.

10. GENERAL SMUTS ON THE NEW CORONATION OATH

13 May 1937

One aspect of the new Coronation Oath as adapted to meet the views of the Union of South Africa is presented by the eloquent address of General Smuts at Capetown on the occasion of the coronation celebrations. In the crowning of the King as King of the several Dominions as well as of the United Kingdom and its dependencies, 'a new chapter has been written in the constitutional development of mankind'. The emphasis is laid in his address on the excellent effects of the admission of equality of status as involved in the placing of the Dominions side by side with Great Britain, Ireland and India, and stress is placed on the abdication of Edward VIII as affording a magnificent proof of Imperial solidarity of a completely spontaneous type. 'It created a situation of unparalleled menace to the unity of our group. Here was a chance for mischief-makers. Here was opportunity for wreckage if wreckage was intended. The confusion of the abdication presented a golden opportunity for any member of our group that favoured disruption.' All that is true, and incidentally affords just ground for condemnation of the sovereign who so lightheartedly placed personal interest above public weal.

But that mischief-makers did not take advantage of it can hardly be seriously contended. That Mr. de Valera did not immediately sever connexion with the Commonwealth was due simply to the calculation that it would be bad business. His remarkable Constitution for Eire still leaves a slender connexion, and simply for the same reasons of prudence. In the Union a magnificent opportunity of solidarity was, with General Smuts' own consent, deliberately thrown away. With clear disregard of law, the abdication of Edward VIII was antedated to December 10 for the deliberate purpose of proving the divisibility of the Crown, and of showing that, if the Union continued the sovereignty in the House of Windsor, it did so on its own terms. What was proved was that the connexion of the Union with the Crown of Great Britain rests on the will of a legislature which is absolutely sovereign, for the assent of the Governor-General to any legislation whatever is assured by the fact that he is the nominee[1] of, and liable to be dismissed by, the ministry of the day. What General Smuts deems a triumph for Imperial solidarity may with equal or greater justice be reckoned a triumph for the doctrine of separatism. If the King of South Africa, as he is there regarded, is a distinct king from the King of Great Britain, then the common allegiance dissolves into two distinct allegiances possessing only a point of contact in the fact of both Crowns being precariously and at pleasure combined in one person. The position is reminiscent of that existing between Denmark and Iceland which rests on an accord which may in a few years be severed. It

[1] Mr. P. Duncan, Minister of Mines, was hastily selected in Nov. 1936 to succeed Lord Clarendon, in obscure circumstances. See Keith, *Journ. Comp. Leg.* xix. 118.

is less close in a sense than that of Britain and Hanover, for that was subject to rupture only through the rule of the Salic law which prevailed in Hanover and excluded a woman from the throne.

One matter must be noted as satisfactory, the acceptance by the Union of the plan of having a single oath for each part of the Commonwealth as opposed to distinct oaths for each, as at one time was contemplated by the Union Government.[1] The advantage of the single oath was obvious. Separate oaths would not merely have exaggerated vastly the distinction of the units of the Empire, but it would have necessitated a choice of an appropriate clerical dignitary to administer each oath, which would have been a matter of grave difficulty. Moreover, in the case of the Irish Free State, an impasse would have been created, for a Roman Catholic bishop could not have taken part in the ceremony in the Abbey. As it was, the acquiescence of Mr. de Valera in the retention of Ireland in the oath must be regarded as a matter of far more fundamental importance than naturally he has been inclined to admit. By accepting it he has not indeed stultified his position, but he has admitted that Ireland, including the Free State, remains among the Dominions of the Crown.

The essential value of this concession is that there can be no doubt in British law that, outside the Irish Free State at least, all persons born on Free State territory are British subjects, since they will continue to fulfil the condition imposed by the British Nationality and Status of Aliens Act, 1914, s. 1, of being born within the King's dominions and allegiance, for the latter qualification is met by the admission that

[1] See nos. 18, 19, *post*.

the head of the State, for external purposes, is still the common head of the British Commonwealth of Nations, as provided in the Executive Authority (External Relations) Act, 1936, and as grudgingly admitted in Art. 29 of the Constitution of Eire.[1]

[1] See nos. 15, 17, 22–4, *post*.

(*b*) THE KING, THE PRIME MINISTER, AND THE COMMONWEALTH

11. THE KING'S PLACE IN THE EMPIRE

12 May 1937

It can hardly be said that Queen Victoria ever had any clear vision of Empire, though she took pleasure in the importance of her possessions and was glad to accept the style of Empress of India, secured for her, not without hesitation, by Disraeli. But to her the oversea territories were essentially colonies, and there is no sign that she understood the significance of the project of styling the newly formed confederation of Canada a kingdom, as contemplated by the imaginative insight of Sir John Macdonald. It was with much hesitation that, towards the close of her reign, she consented to the absence of her grandson for the purpose of opening the first Parliament of the newly created Commonwealth of Australia. Edward VII never fully realized the changed position of the great self-governing colonies. Only with reluctance did he permit the Duke of York to keep the engagement sanctioned by his mother. Happily for the Empire, the Duke of York realized from his visit the great importance of the self-governing colonies of the Empire, and it was entirely in accordance with his views that the Colonial Conference of 1907 took the decision to recognize their new status by giving them the style of Dominions, and by arranging that the next Conference should be styled Imperial, and should be a Conference between Prime Ministers, not of colonial Premiers meeting under the chairmanship of the Secretary of State for the Colonies. When he succeeded his father, the King's attitude expressed itself in the unfailing approval which he gave to the decisions

which were reached regarding the improvement in Dominion status. The only point on which he felt some natural hesitation was the decision, implicit in the Conference resolutions of 1926, and fully explicit in those of 1930, that the King should be directly advised by the Dominion Governments on the same footing as that of the United Kingdom. His Majesty saw in this the genesis of a problem for which no solution was then or is now available.

The King, in fact, has two very different functions to play in the Empire. In the course of its evolution the Empire at the moment consists of a number of autonomous units, of which one far surpasses the rest in strength and world importance. The United Kingdom, with the colonies, protectorates, and mandated territories, forms the centre of the royal activities, but the Dominions with their dependencies have claims upon the King, and India and Burma occupy yet another position.

The relation of the Dominions with the King is essentially the same as that of the United Kingdom; their people owe him allegiance, and he is their constitutional head. But there are difficulties in the position due to distance, which no improvement in methods of communication can wholly remove. The position of the King in regard to the government of the United Kingdom[1] depends essentially on his personal performance of a very large number of Acts of State, and the intimate relation which he holds towards his Prime Minister and, in a less degree, towards the other members of the Cabinet. His share in government is thus personal and real. It is essential that for every act there must be ministerial responsibility, but

[1] Keith, *The King and the Imperial Crown* (1936), chap. ix.

the right of the King to receive the fullest information regarding matters he must approve, to discuss them fully, to raise objections and suggest changes, is beyond question. That Edward VII was the author of the policy of the *entente* with France it would be absurd to suggest; that he participated actively in carrying it into effect is equally undeniable. In the case of the Dominions such personal touch is lacking; for the most part royal functions are delegated to the Governor-General, and the few matters, mainly of external affairs, with which the King is concerned, come to him in a manner which prevents that exercise of the right of discussion and suggestion which plays so valuable a part in British affairs.

But the difficulty of the royal position is much increased by reason of the fact that each Dominion is autonomous, each may have its own foreign policy, and each still acts in vital questions through the King. So far the King has been saved difficulties in the main by the Dominion habit of abstention in foreign affairs, leaving Britain to act alone. But there was all but a really grave problem to be faced recently when efforts were made to induce Mr. de Valera to recognize the Spanish rebels as the legitimate government. Fortunately, despite the influence of the Roman Catholic Church, Mr. de Valera remained firm against such action, for plainly it would have been gravely embarrassing for the King to recognize, for the rest of the Empire, the Spanish Government, but for the Free State, General Franco's administration. Whether any breach can be avoided in future depends largely on the moderation of Ministers in the Dominions and the United Kingdom alike. But it is useless to ignore the very awkward position of the King, who is

compelled, whether he so desires or not, in the last resort to seek by personal influence to secure consistency of action. It is easy to sympathize with King George V in his feeling that to place such a burden on the sovereign was hardly wise. But the fact that it has been done clearly imposes on the ministries of the Empire an absolute obligation to show the utmost consideration for the monarch.

In yet another aspect the King's position is fundamental for the Dominions. It is through the allegiance which is due to him from their people that they are connected with the other parts of the Empire, and enjoy British nationality. Happily, in most of the Dominions this position is accepted with full appreciation of membership of so vast a community. Only in the Union of South Africa and the Irish Free State is there any objection to this vital state of connexion, and it is doubtful whether the Union will press unduly its desire to substitute for British subjecthood the less close bond of subjecthood to the King,[1] thus emphasizing the complete separation of the Union from the United Kingdom save as regards the royal person. For the rest of the Empire the tie of allegiance and nationality remains paramount.

For the territories comprised in the Colonial Empire kingship has special importance. It solves the problem of the position of the chiefs in the protectorates by giving them the feeling, very highly prized, of direct relations with the greatest of sovereigns, and the royal audiences accorded from time to time to such chiefs assure their loyal acceptance of the control exercised over them on behalf of the Crown by the protectorate governments. But kingship is not less important in the

[1] See nos. 22–4, *post*.

colonies proper both with the European and the native populations. Allegiance to a sovereign people, as in the case of France, is far less easy to appreciate and to value than that to a personal embodiment of authority. The right to petition the sovereign which applies throughout the colonies is unquestioned, and petitioners know that by constitutional practice the King must approve the answer which is returned to their appeal, and that he can be asked to do so only after full investigation of the petition has taken place.

For India the position of the King-Emperor is fundamental, for only through him, pending federation, is there any link between the States and British India. Even when federation becomes operative, the King must remain of vital importance in the structure of relations with the States. The duty of allegiance owed by the Princes implies as its counterpart that of protection, and the control of the position of the Princes no longer rests with the Secretary of State in Council to act as an effective barrier between them and their sovereign. It is inevitable that under the new order of things the Princes will more and more look to the Crown to secure the due observation of their rights in all matters that they may not surrender to federal control, and that appeals to him will more and more frequently have to be submitted for his consideration. There are, no doubt, difficulties in the position, but they are inevitable, and in the present condition of Indian affairs anything which tends to strengthen the bond between the States and the King-Emperor must be regarded as desirable. Even under the old régime the regard for the rights of the Princes felt by Queen Victoria[1] was well known, and her

[1] Keith, *The King and the Imperial Crown*, pp. 407–12.

interest in them was shared by her son and her grandson alike.

For British India and Burma alike the new constitutional status involves an increase in the extent of relations with the Crown, by which all governmental powers become exercisable. That means that important issues affecting these lands must more and more become the subject of Cabinet discussions prior to submission for royal approval, and that the King personally must be associated in an increasing degree with the development of constitutional rule in India and Burma. Fortunately the opportunity for personal contact with India at least will be afforded by the visit to that country definitely promised at as early a date as may be practicable, after making allowances for the very heavy burden undertaken by the King in assuming under unparalleled conditions his high office. It may, indeed, be hoped that his presence in India may win back to full appreciation of the monarchy many of those whose desire for complete independence is based on fallacious premisses, and who do not realize how difficult it would be to create a republican organization for India in which places could be found for the States. Nor should it be forgotten that it is the common allegiance which secures to the people of British India equality of treatment with other subjects of the King in the United Kingdom and almost the whole of the Empire outside the Dominions, and that it presents a solution for the maintenance of relations with the United Kingdom when the ideal of Dominion status is finally attained.

12. THE KING, THE PRIME MINISTER, THE ROYAL PREROGATIVE, AND PARLIAMENT

28 May 1937

One of the characteristics of Mr. Baldwin which has least attracted public attention is the attitude which he has, throughout his term of office, adopted towards the royal prerogative and the position of the Prime Minister. We cannot suppose that it is by accident that he has consistently increased the importance of the Prime Minister by transferring definitely to his office control of the discretionary power of the Crown.

1. It was strongly held by Lord Oxford and Asquith, founding his view on unbroken tradition, that the authority for a dissolution of Parliament must rest with the Cabinet, and that the King was entitled to have the advice of that body before he consented to give a dissolution. So far as the facts have been published, it is impossible to avoid the impression that in deciding upon the dissolution of 1935 Mr. Baldwin claimed for himself the full power to determine the issue. It is, of course, true that in these matters a Prime Minister occupies a special position, for he differs from his colleagues in that his resignation determines the life of a ministry, and he has thus a cogent instrument under his control whereby to mould the views of his colleagues to his own. But it is certainly remarkable that the claim to decide a dissolution should have been made and apparently enforced, without effective or perhaps any protest.[1] The Prime Minister of Canada's primacy in regard to recommending a dissolution was formally affirmed by Order in

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 31, 32.

Council in 1920,[1] but his recommendation had to be put forward with the assent of the Council, and not as an individual decision. Whether the change of view introduces a new convention, or whether it is merely due to the personality of a man of autocratic character, remains to be seen.

2. Another matter of great importance is the tendency to minimize the authority of the King in matters of foreign affairs, that is, the sphere in which in modern practice[2] the position of the Crown has claimed fullest respect. It is impossible to overlook the fact that, when it was proposed, during the Ethiopian conflict, to transfer to Ethiopia a strip of Somaliland territory in order to compensate Ethiopia for proposed concessions to Italy, the consent of the sovereign was not secured in advance as it should plainly have been.[3] It is clear that this means that the sovereign is to be more and more in the position of a Governor-General under modern practice, to serve as ceremonial head of the State, but to be divorced from all essential contact with the conduct of its business.

3. This tendency to the reduction in importance of the royal functions has naturally gained enormously from the abdication of Edward VIII, and the mode in which it was brought about. That episode establishes that in the case of clash of opinion between the King and his Prime Minister the former should not look to outside guidance of any kind. It is, of course, possible that Mr. Baldwin made no such claim, and it has been stated that Mr. Churchill actually had an interview with the King before the decision to abdicate, but

[1] Dawson, *Const. Issues in Canada, 1900–31*, p. 125.

[2] Keith, *The King and the Imperial Crown* (1936), chap. x.

[3] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 131, 139–41.

Mr. Churchill was not the leader of the Opposition and must have acted merely as a private friend of the sovereign. In any case, the prestige of the monarchy has suffered so grievously that the position of the Prime Minister has enormously gained in strength.[1]

4. In the same spirit Mr. Baldwin deprived the King of his hitherto unfettered discretion regarding the appointment of Counsellors of State to act for him in illness. The Regency Act, 1937, dealt with this power without necessity, and removed from the King all discretion, not even permitting him to discriminate among members of the royal family in the line of succession. It is impossible to see why the King should have been forbidden to make his own choice in such a case, always, of course, in consultation with his Prime Minister.[2]

5. The episode of the retirement of Mr. Baldwin from office accords admirably with his conception of his position. There was no suggestion of reticence in advising the Crown as to his successor, it was clearly announced in the press[3] before the event of his resignation not only that he would advise the selection of Mr. N. Chamberlain, but that the advice would be acted upon. There is certainly no parallel for such a position, and the extent of the Prime Minister's authority was marked by the royal acquiescence in the conferment of a Viscounty on Sir J. Davidson, whose claim to an honour, contemporaneously deemed sufficient for so distinguished a statesman as Mr. Runciman, could be justified only on the score of personal friendship. His exclusion from the new ministry would have been normally inevitable in view of his complete failure

[1] See no. 1–3, *ante*.

[2] See no. 6, *ante*.

[3] See *The Times*, 28 May 1937.

to establish for himself a reputation in the House of Commons. But the episode, like that of the peerage conferred in 1935 on an ex-minister of slight distinction in order to find a seat for Mr. M. MacDonald, when rejected by the electorate, is eloquent of the extent to which under Mr. Baldwin the royal prerogative of honour was engrossed by the Prime Minister.

6. It is easy, therefore, to accord credit to the prevalent rumour that, prior to the abdication crisis, annoyance had been caused to the Prime Minister by the expressions used by the King during his tour in the distressed areas in Wales, which might be interpreted to mean that he was determined to put pressure on ministers to remedy the deplorable position of which he was an eyewitness. It seems difficult to justify the ministerial annoyance. The words of the King as reported seemed well within constitutional limits, merely indicating his deep sense of the disastrous position of the unemployed, and his confidence that there would be taken steps effective to make good the matter.

7. Almost the last act of the Prime Minister imposed on the King a duty which can hardly have been acceptable, the decision to deny the style of Royal Highness to the wife of the Duke of Windsor.[1] It was a decision awkward in the extreme, for it creates a position in which the wife of a Royal Highness is deliberately marked out as unworthy to be treated as her husband's equal. It must be remembered that the royal abdication did not deprive the ex-King of the style of Royal Highness or Prince, and that he could have been deprived of either only by the definitive authority of the King, taking away from him what was otherwise his right under rules approved by Queen Victoria,

[1] Letters patent, 27 May 1937.

Edward VII and George V alike. The fact that the Duke and his children had ceased to be in the line of succession was irrelevant, for the children of Princess Mary, who are in the line, were never accorded the style of Royal Highness or Prince. It would have been simple to deny the style and title to any children without any unfairness, but to deny it to the wife was a measure difficult to understand, unless, of course, it is taken as a recognition of the doubt of the validity in English law of the first divorce of the lady in question, a matter on which Mr. Baldwin refused to make any statement when in office.[1]

8. The aggrandizement of the Prime Minister's office as against that of the King has naturally been accompanied by a growing demand that the House of Commons should place trust in the Prime Minister rather than expect from him reasoned defences of his own action. There is no doubt of the extent to which this demand was made during his term of office by Mr. Baldwin. In 1923 he compelled his followers to accept his premature effort by dissolution to attain a mandate for protection and Imperial preference; the extension in 1928 of the suffrage to women on the same terms as men was a policy which his own colleagues regarded with doubt, and to which most of them had deliberately refused to commit themselves at the general election of 1924. His policy on India was enforced in 1934–5 essentially by personal authority rather than by reason; the support he demanded in the amazing fiasco of the Hoare–Laval terms in December 1935[2] was in the true Fascist and Nazi style of an appeal to

[1] See no. 1, *ante*, with note.

[2] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 149, 150, 162, 163.

follow the leader with blind devotion; and the same personal authority dominated the attitude of the supporters of the Government towards the civil war in Spain. It is significant that under his sway the House of Commons acquiesced without pressing the issue in many matters of great importance and doubt. It accepted from him the changes in the new Coronation Oath without questioning their validity; it acquiesced in the prolonged failure to enforce the Foreign Enlistment Act, 1870, against the supporters of the rebels in Spain, and the sudden activity in enforcement when aid was reaching the legitimate government.[1] It passed the Regency Act[2] without venturing to ascertain whether or not it was legislating for the Dominions, as part of the *arcana imperii*; and the followers of the Government appear to have been perfectly prepared to allow Mr. Runciman[3] to declare that the protection of the British navy would be withheld from Dominion ships if they did not comply with the new regulations, in complete derogation from normal canons of international law, which it had pleased the British Government without Dominion concurrence to accept. There were manifestly dangers in the establishment of such an ascendancy in the case of a man, whose age naturally produced a measure of caution and reluctance for adventure which made him rather a feeble adversary to the forceful personalities of Herr Hitler and Signor Mussolini.

9. Not the least remarkable feature of his régime was the decision to employ the Treaty of Peace Act, 1919, which gave force to the Treaty of Versailles, as the basis for the carrying out of sanctions against

[1] See II, nos. 15, 16, *post.*

[2] See nos. 4–6, *ante.*

[3] See II, no. 14, *post.*

Italy.[1] There has been no more striking example of the exaltation of the power of the executive, unless it be in the deliberate refusal to obtain statutory authority for the amendment of the Coronation Oath.[2]

10. Mr. Baldwin's tenure of office must therefore be reckoned as an epoch of the deliberate aggrandizement of the executive at the expense of the legislature; of the engrossment into the hands of the Prime Minister of an ever increasing portion of the authority of the Crown; and of the further accentuation of the primacy of the Prime Minister. The advance may be arrested under his successor, but it would be unfair not to note it. One issue also may help Mr. Chamberlain to avoid stressing so strongly the personal position of the Prime Minister. It was brought very clearly out by Mr. Churchill on June 1, in the debate on the National Defence contribution, that the impost represented the policy of the Chancellor and the Prime Minister, and not of the Cabinet, which had been informed only at the last moment, and which had no opportunity to investigate the merits or demerits of the scheme. It was not difficult for Mr. Churchill to prove that precedents were entirely against the procedure followed. The famous land-taxes of the Liberal Ministry had been carefully considered in Cabinet as was the betting-tax. There is, in fact, no answer to the objection raised to ignoring the Cabinet, and the necessity of withdrawing the measure, despite a strong defence by Sir John Simon as Chancellor, may serve as a warning that, however weak a Cabinet may be in intellect, to neglect collective advice may present dangers even for

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 145–8.

[2] See nos. 7–10, *ante*.

men abler than the Prime Minister and his Chancellor of the Exchequer.

11. In yet another point Mr. Baldwin doubtless made too great a demand on the loyalty of his followers. The increase of ministerial salaries during a time of national pressure could not but have a painful effect on the ordinary taxpayer who profits nothing from the vast expenditure[1] on armaments and from the raising of vast sums by loan. No doubt the wide prosperity thence resulting to the classes among whom Ministers move may have seemed to Mr. Baldwin to afford justification for adding heavily to the burdens of the public, both immediately by the increased pay, and indirectly through the incentive further to increase official salaries of all kinds. But it would have been far more impressive if in time of national difficulties Ministers, without a mandate from the electorate, had refused to enrich themselves at the public expense. It is significant that, though the measure was a governmental one, it could pass the third reading only by 44 votes. Nor can the payment of the leader of the Opposition and the grant of pensions to ex-Prime Ministers be regarded as suitable for adoption in such circumstances.[2] Even less satisfactory perhaps is his decision that the pay of members should be raised to £600 a year. For those in Parliament, without asking a mandate, to increase their own remuneration argues an insensitiveness to points of honour which bodes ill for the possibility of their rendering disinterested service to the country. The Dominions suffer much from

[1] Some £75,000,000 extra profits are anticipated yearly, of which £25,000,000 will go to the State under the substituted duty now imposed.

[2] The minimum extra cost was placed at £37,000 a year plus pensions to ex-Prime Ministers. It was also commended to the Lords as making inevitable the presence in that chamber of at least three Cabinet ministers.

the professional politician whose pay is his chief interest in politics, and it is unfortunate that his introduction into Britain should thus have been facilitated by Mr. Baldwin as his last public act of importance.[1]

It must be added that the primacy of the head of the Government seriously increases the burden of his responsibility for the defective conduct under his régime of foreign policy, though his predecessor must share in the blame for the failure either to warn the Emperor of Ethiopia that he must not expect effective support from Britain, or to operate honourably the obligations placed upon the Crown by the League Covenant. For that breach of faith responsibility rests also in large measure on Mr. Neville Chamberlain, whose description of keeping faith in the matter of sanctions as 'midsummer madness'[2] is an unhappy blot on an otherwise distinguished career. For the ineffective handling of the Spanish issue Mr. Eden must also bear his share of blame. Nor can it be ignored that he had the incentive of pleasing his followers, who admired a programme of rearmament, rich in possibilities of the acquisition of wealth, coupled with a determination to pay almost any price for the maintenance of peace, and the excuse that the consistent refusal of youth to be induced to enter the regular army, despite all concessions and appeals, indicated a resolute dislike of war, even though the air force and the navy could obtain recruits.

[1] One excuse for action was that such an issue should not be raised at a general election, surely a complete admission of the impropriety of the action taken and of the decline of the moral standard of Parliament.

[2] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 188, 191.

(*c*) BRITISH RELATIONS WITH THE IRISH FREE STATE

13. THE NEW IRISH CONSTITUTION

To the Editor of THE SPECTATOR, *13 November 1936*

The recent pronouncement of Mr. de Valera regarding the Constitution of the Irish Free State seems to open up the possibility of securing at long last the satisfactory settlement of the controversy between Britain and the Irish Free State. It is guided by that statesmanlike prudence which has marked so much of Mr. de Valera's dealings with the British Government. At a time when he might so easily have marred the rejoicings over the coronation by a direct challenge, he has deliberately refrained from forcing the issue and suggested a solution.

Mr. de Valera's proposals for the internal government of the Free State mark a most important advance on the present Constitution. The original draft of the Constitution in 1922 proposed the elimination of the Crown, and it was only on British insistence that the royal authority was formally inserted. Mr. Cosgrave worked indefatigably and with almost complete success to eliminate it. He severed all connexion between the Civil Service, the Army and the Judiciary, and the Crown, and reduced the position of Governor-General to that of a servant of the Free State Government. It was he who refused to allow the British Parliament to safeguard the treaty of 1921 in the Statute of Westminster, who nullified the appeal to the Privy Council, and who for party ends swept away the safeguard of the referendum for constitutional change.

The legality of all that has been done since by Mr. de Valera has been formally asserted by the Privy Council in *Moore* v. *Attorney-General for the Irish Free*

State, on which I commented in your issue of June 21, 1935.[1] Nothing can be more humiliating than the position of the Governor-General as matters now stand. Debarred from participation in any State ceremonial, his one function is on instructions to sign Bills. Mr. de Valera is acting most wisely in deciding to terminate a painful farce, and to remedy a grave defect in the Constitution. He has realized, as has recently been realized by Mr. Justice Evatt in Australia, that the decision of the Imperial Conference of 1930, which destroyed the authority of the Governor-General by making him the nominee of the Dominion Government, completely destroyed the legitimate influence of the Crown as charged with the function of protecting the interests of the people from undue exercise of power by the Ministry of the day, and gave to Dominion Ministries a plenitude of unfettered power which would be deeply resented if it existed in the United Kingdom.[2] In proposing that the head of the State should be elected and have certain powers apart from ministerial advice, Mr. de Valera is repairing a grave error and according a much-needed safeguard. In the same way it is all to the good that he intends to give to the people the protection of the referendum against rash constitutional change, of which Mr. Cosgrave without warning deprived them.

For Britain to object to these changes would be equally unwise and futile. What is essential is the relation of the Free State to Britain in external affairs, and in this matter Mr. de Valera's moderation is admirable. The Privy Council decision left it open to him to confer on the head of the State the right to exercise every

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 41 ff.

[2] Cf. ibid., pp. 82, 83.

attribute of external sovereignty, as General Hertzog, with the permission of his late Majesty, has conferred the right on the Governor-General of the Union of South Africa. If this were done, the Free State would have been for every purpose wholly independent of the personal action of the King, and separation would be a *fait accompli*. Instead, Mr. de Valera has referred pointedly to the precedents of Canada, Australia and New Zealand, by which royal action for the highest international acts is still fully respected. He has, therefore, deliberately left open the possibility of securing, what he suggested in 1921, complete internal sovereignty with co-operation in external affairs with the British Commonwealth. Is this to be sacrificed from pique, or will our politicians add distinction to the coronation by securing before it a real accord with the Free State?

It will, of course, be argued that Mr. de Valera will accept nothing without the surrender of Northern Ireland; the sufficient answer is that no offer on the main issue has been made to him. It will also be argued that he has broken faith over the annuities. The answer is that no judicial tribunal has determined the issue, that Mr. de Valera has offered to accept an international tribunal's decision, and that his case is capable of such strong argument that the British refusal to agree is probably wise. In the changed state of European affairs and the severe blow to British security from Italian ambitions and the revival of German militarism, the restoration of full relations with the Free State would be well worth some sacrifice.

14. THE KING AND THE IRISH FREE STATE

To the Editor of THE SCOTSMAN, *14 December 1936*

Examination of the text of the Acts to amend the Constitution and to provide for the exercise of the executive power in certain matters of external relations, passed last week by the Irish Free State Parliament, confirms Mr. de Valera's claim to have eliminated the Crown from internal affairs. The Crown ceases to form part of the Legislature or Executive, and loses the power to appoint the Ministry, Judges, and members of the Constitution (Special Powers) Tribunal, that unfortunate legacy of Mr. Cosgrave to his successor. The authority vested in the President of the Council is thus free from even nominal control, but it must be remembered that the Act embodies none of the further amendments of which Mr. de Valera has spoken, and that he will no doubt later submit to the electorate his two important projects—(1) for the creation of an elected head of the State with powers not wholly subject to ministerial control; and (2) for the establishment of a second chamber. As a permanent Constitution the present form is clearly unsatisfactory.

2. In external affairs there must be noted the omission from the Act of any provision that the Crown should be asked to act in the vital matters of the declaration of war and of neutrality. In strict law, therefore, these powers may be deemed to be exercisable by the Executive Council alone, subject, in the case of war, to the assent of the Legislature. It is clear that this position is anomalous, and that it runs counter to the principle that in regard to the appointment of diplomatic representatives and treaty making the State proposes to use the Crown, and that, as Mr. de Valera has insisted,

Article One of the Constitution providing for the Free State's membership of the British Commonwealth of Nations remains intact, representing as it does his own consistent policy. The issue of neutrality is of more practical importance, and it is possible to argue that it is better that, if the Free State were to decide to remain neutral in a British war, the declaration should be made in the name of the State, not of the King. On the whole, however, it would have been more consistent and therefore more satisfactory to ascribe to the Crown also the formal acts of declaring war and neutrality. But the essential point is that the State will be represented in foreign countries by Ministers who are accredited by the King, and that foreign countries will be represented therein by Ministers accredited to His Majesty. For external purposes, therefore, it remains that the Free State is a monarchy.

3. The Act to amend the Constitution is unquestionably not very well drafted. The most obvious slip is the failure to abolish the office of Governor-General, while taking away his powers under the Constitution, in so far as the present holder of the office is concerned. This slip will be amended later and the necessary changes made in Acts referring to the office. Less clear is the difficulty created by giving to the Chairman of the Dail the power to summon and dissolve the Legislature. Technically, on dissolution the Chairman ceases to exist, and to summon seems difficult; but the British practice of one proclamation to dissolve and summon suggests a way out, and in any case amendment is simple.

4. Mr. Costello raised the issue of the legality of the new legislation on the score that the Supreme Court had ruled, in *The State* (*Ryan*) v. *Lennon* (1935 Irish

Reports, 170), that the Constitution made the Treaty of 1921 the supreme law of the land, and that it could not therefore be overridden by mere legislation. The objection is substantial, because all the Justices agreed in that case in this opinion, though a majority held that the legislation there attacked did not contravene the Constitution. But since then the Privy Council in *Moore* v. *Att.-Gen. for the Irish Free State* (1935 Appeal Cases, 484) has ruled that the Statute of Westminster leaves the State free to legislate without regard to the Treaty or the Constitution. The Supreme Court is not bound by the Privy Council's view, and prima facie for the State its opinion is sound. But it seems unlikely that it would refuse to revise its doctrine, and in any case the addition of members to the Court by authority of the Dail could no doubt be used to secure the desired result. But the position is difficult for the distinguished members of the Court.

15. IRISH FREE STATE NATIONALS

To the Editor of THE SPECTATOR, *6 February 1937*

Your correspondent's inquiry in your issue of the 5th instant as to the status of British subjects who are also Irish citizens, raises the most difficult question of the relations of British and Dominion legislation since the Statute of Westminster, 1931, which has also emerged in regard to the royal abdication and the Regency Bill. The issues must ultimately be decided by the Courts. But pending their action the following propositions may be submitted.

1. Mr. George Bernard Shaw always has the best of both worlds. He is, in the United Kingdom and in those parts of the Empire where British legislation affecting

nationality prevails, a British subject. Can he be blamed for securing Irish nationality—the term has the sanction of the Irish Nationality and Citizenship Act, 1935, which received the royal assent—when the alternative was that he would be an alien in his beloved place of birth? The Irish Free State cannot deprive him outside the Free State of his birthright as a subject of the King.

2. The position of persons who were, prior to the passing of the Irish Nationality and Aliens Acts, 1935, British subjects, while within the State, is extremely difficult. In Irish law, of course, they are normally Irish Nationals, but some are aliens. One way of looking at the position is to hold that British courts must regard them as British subjects in general but as deprived of that quality while in the State. It may be held that this view is due to be accepted, as only thus can full effect be given to the Statute of Westminster and the political autonomy of the Free State which it recognizes. The point could be neatly settled if a member of the Irish Brigade were arrested and tried in England on the score that he committed in the State one of the acts forbidden to British subjects by the Foreign Enlistment Act, 1870. It may be that he would be held not to be within the terms.

3. Some, of course, contend that an Irish national outside the State is not in British law a British subject. The answer is that in such cases there are conflicting legal provisions and that British Courts should follow their national law.[1]

One question may be permitted. Will the Dominions Secretary explain under what doctrine of constitutional law he discusses with the President of a semi-republican State, behind the back of the duly constituted Govern-

[1] See no. 10, *ante*.

ment of Northern Ireland, the possibility of transferring that territory to the control of the Irish Free State? Is it not his clear duty to explain that paramount considerations of constitutional usage preclude him, in view of the change in the status of the Irish Free State, from discussing with the head of its Government any issues affecting the autonomy and security of Northern Ireland? Does not the present procedure constitute a deliberate incentive to the Free State to keep continuously pressing its case on the British Government in the expectation that sooner or later it will find a Ministry susceptible to such pressure? Is it not time that it should be made clear that the road to union runs through Belfast, and not London? We owe full respect to the autonomy of the Free State, but we are equally bound since 1920 to respect that of Northern Ireland.

16. A PLEA FOR AN ANGLO-IRISH SETTLEMENT[1]

MANCHESTER GUARDIAN, *27 April 1937*

To this earnest plea for the reconciliation of the United Kingdom and the Irish Free State, in view of the danger of a European war, in which Irish hostility would be a serious menace to British security, the author brings high credentials. An Irish nationalist, a friend and vindicator of Parnell, he was wounded in the Great War, and as secretary of the Irish Dominion League loyally supported the Treaty of 1921. Ever since he has endeavoured to present the Irish position clearly and fairly to the British people, and his new work deserves the fullest consideration by all those who wish to form a sound judgement on a serious issue. On one matter

[1] *Ireland and the British Empire, 1937. Conflict or Collaboration?* By Henry Harrison (Hale, 1937).

there is probably now no serious dispute. Grave errors were made in regard to the carrying into effect of the arrangements for raising forces in Ireland for the war, and the contribution of Ireland, despite these errors, to the ultimate victory of the Allies has been systematically under-estimated.

Mr. Harrison's exposition of the nature of the Irish Treaty and of Dominion status is elaborate and very well argued. He rightly does not exaggerate the importance of the land annuities question as a ground of hostility between the two countries. It is far from being simple for either side; perhaps both are aware of the defects in their case and are not sorry to be able to evade a judicial decision by energetic disagreement regarding the nature of the tribunal to which it should be submitted. The chief error on the British side was unquestionably failure to insist that the final settlement of 1926 should be treated as of the same importance as the boundary accord in the preceding year and given complete effect by legislation in both countries.[1] No doubt the motive was to render it easier for the Free State Government to avoid affording opportunity of attack to its opponents; but the error was grave, and presents Mr. de Valera with some moral ground for his attitude. Mr. de Valera's own legal contentions, however, are open also to serious assault, and plainly the matter is one on which compromise should have been easy. But Mr. de Valera must bear his share of blame for failure to attain this equally with the British Government.

While it is easy to sympathize with Mr. Harrison's view that there is really no reason why co-operation with the United Kingdom should not be possible on the

[1] Keith, *Letters on Imperial Relations*, 1916–35, pp. 131–3.

basis of external association through the Crown, as already laid down by the Constitution (Amendment No. 27) Act of December 1936, and to regret that that plan of Mr. de Valera's was not accepted in 1921, it cannot be said that his legal arguments are decisive. We are told that 'Dominion sovereignty is unqualified as to internal affairs' and that it is only as to external affairs that it is qualified by common allegiance and free association in the British Commonwealth of Nations, while freedom of association clearly implies freedom of dissociation. But unfortunately these statements can be denied with as perfect good faith as that in which they are asserted. The famous Preamble of the Statute of Westminster, 1931, with its principle that any change in the succession or the royal style and titles requires constitutionally the assent of the Parliaments of all the Dominions as well as that of the United Kingdom, may be adduced to show that the sovereignty of the King, internal no less than external, is an essential part of the British Commonwealth system of relations, and the famous precedent of the United States may be cited to show that freedom of association does not imply freedom of dissociation. It will be remembered that in the Union of South Africa General Smuts still maintains that the right of secession is not implied in Dominion status, while General Hertzog is convinced that it is. Nor again will many lawyers accept Mr. Harrison's thesis that the State right of counter-claim in respect of past demonstrated over-taxation was not released by the Boundary Agreement of 1925; that they will regard as little better than a quibble. The truth is that, if there is to be any accord, it will not be reached by constitutional discussions but by a new outlook on both sides, and we may fear that perhaps breadth of view is

lacking in the Free State no less than it is in the United Kingdom.

One grave difficulty, perhaps insuperable for the present, is that of Northern Ireland. Mr. Harrison stresses the generosity to that territory of the British Parliament; it is undeniable, and the Northern Irish might be more demonstrative in their appreciation of it. He also stresses the wrongs of the minority, its lack of power to have its grievances remedied, and the injustice it suffers under the excessively wide authority of the executive under the Civil Authorities Act, 1922. There is much truth in what he says, but it is hopeless to expect Britain to intervene to revoke the grant of authority given in 1920. If the price of the co-operation of the Free State is the coercion of Northern Ireland, it may safely be said that the price will not, and on the whole justly, be paid. Cannot the Free State realize that reconciliation with Northern Ireland must be preceded by the restoration of friendship with Britain?

17. THE NEW CONSTITUTION: A BRITISH VIEW

IRISH INDEPENDENT, *7 May 1937*

No vital change in the relations now existing under Amendment No. 27 of the Constitution between the Irish Free State and the United Kingdom is contemplated in the new Constitution devised under Mr. de Valera's auspices for Eire.

Matters indeed are made vaguer, but vagueness is a characteristic of the Constitution, which leaves much essential detail to be defined by legislation. But emphasis is laid on the inalienable, indefeasible and sovereign right of the Irish nation, not merely to choose its own form of government, but to determine its relations with

other nations, thus disposing of any possibility of holding that secession from the British Commonwealth is impossible under the Treaty of 1921.

Equally, the right of neutrality in a British war is thus asserted; but nothing is done to affect directly the existing position regarding the presence of British forces on Irish territory, which in the eyes of foreign States would doubtless impair the right of Eire to claim respect for her neutrality. The prohibition of the maintenance of any armed force otherwise than by the Oireachtas (Article 17) is directed rather at the suppression of private forces like the I.R.A.

The disappearance of the Crown from the Constitution remains modified by the authority given by Article 29 to the Government to adopt in external relations any organ or method of procedure adopted by the members of any group or League of Nations with which Eire is, or becomes associated, for the purpose of international co-operation in matters of common concern.

Put in plain language, this means that in Diplomatic and Consular matters, and in the conclusion of treaties, Eire may make use of the British Crown.

At the same time it must be noted that there is nothing whatever to compel the use of the Crown and, therefore, if the Government of Eire so desires, it can function absolutely as an independent Republic, despite the decision not formally to adopt that style. There is thus a very marked distinction between Eire and the Union of South Africa. That Dominion may, without secession from the Commonwealth, operate with complete independence, but in the name of the Crown. Naturally the Constitution gives no authority to the Government thus to act.

There is nothing vitally new in the claim that the

national territory consists of the whole of Ireland, or the reservation of the right to Parliament and the Government of Eire to exercise jurisdiction over the whole area, for it is made patent that the right is to remain in abeyance.

Little is done to increase the difficulty of the reunion of Ireland, but nothing to facilitate it, for the otherwise very satisfactory Article 44 on religion, in formally recognizing the special position of the Roman Church, must inevitably arouse difficulty in Northern Ireland.

Unless action were to be taken under the Constitution to affect the present position of British forces in the Free State, there seems no reason why the British Government should feel that the new Constitution is more open to objection than the legislation of December 1936, save probably in its failure to make it part of the Constitution that Eire is a member of the British Commonwealth of Nations. For Northern Ireland, of course, that omission is crucial.

Mr. de Valera's promise of greater independence for the head of the State than could be conferred on a representative of the Crown has been duly kept. There was nothing to be said for the Constitution of 1922 which turned the head of the Irish Free State into a mere figurehead, and vested unfettered power in the Executive Council so long as it had a bare majority in the Dail. The President, who happily for most of us is to continue to bear a familiar name, is given the essential authority in his absolute discretion to refuse a dissolution to a Prime Minister who has ceased to retain the support of a majority in the Dail; but he is no longer compelled to refuse it, as he should have done under the Constitution of 1922. It must be noted that the President may give a dissolution to his Prime Minister

against the wishes of the majority of the Government —the term Executive Council disappears—so long as confidence has not been withdrawn from him formally by the Dail.

This exaltation of the position of the Taoiseach is in accord with the apparent claims of Mr. Baldwin, but there is much to be said for the view of the late Lord Oxford and Asquith that a dissolution should be accorded only on the advice of the Cabinet as a whole.

The President does not receive the power to dismiss a Ministry which has ceased in his view to command the confidence of the electorate, though still with a majority in the Dail; if the majority therein is lost, the Taoiseach is required to resign, and, no doubt, if he did not do so the President *ex necessitate* could remove him. It might have been hoped that the power to compel an appeal to the people if a Ministry were misusing power would be given; but a limited measure of protection against misuse of legislative authority is rendered available by the grant of certain powers to the President. Thus he may, under Article 24, refuse to comply with the desire of the Dail to rush a Bill through without giving the Senate the normal power to delay its passage; he may, if he thinks that a Bill contravenes any provision of the Constitution, under Article 26, refer it to the Supreme Court, and if it reports that there is repugnancy he must decline to sign the Bill.

He may also, on a petition of a majority of the Senate and a third of the Dail, under Article 27, asking for ascertainment of the will of the people in view of the national importance of any Bill, passed over the head of the Senate, refer it to the people. It rests with him also to decide whether a request of not less than thirty members of the Senate that a Bill be referred to a

Committee of Privileges on the issue whether it is or is not a Money Bill, and so open to amendment by the Senate, shall be granted or refused.

In exercising these powers in regard to Bills he must consult, but need not take, the advice of the Council of State.

The creation of this body is the chief novelty of the Constitution.

It consists of the Taoiseach, the Tanaiste, who is his Deputy, the Chief Justice, the President of the High Court, the Chairmen of the Dail and Senate, and the Attorney-General, who is given the honour of a special Article in the Constitution, but forbidden to be a member of the Government. Any ex-President, ex-Chief Justice, or ex-Taoiseach may serve, and the President may add seven further members.

We have something here in the nature of a Council of Elder Statesmen, and it is a little surprising that the Council is not brought in to aid in the very difficult issue of the grant of a dissolution; in that case the Taoiseach and the Tanaiste need not have sat.

The Council has a useful function in determining the temporary or permanent incapacity of the President, whereupon his functions devolve, as in the case of his absence, death, resignation, or removal from office, on a Commission consisting of the Chief Justice and the Chairmen of the Dail and Senate. Moreover, it is given a useful residuary authority to provide for the exercise of the powers of the President in any unforeseen crisis. These provisions compare favourably with the involved terms of the Regency Act, 1937, of the United Kingdom.

It is interesting to note that on American precedent the President may, after consultation with the Council,

address messages to the Houses of the Oireachtas or to the public on matters of national or public importance, but only with the approval of the Government. He may, however, after consulting the Council, convene a meeting of either or both Houses of the Oireachtas without such approval.

This might easily prove a most valuable power, for it could be used to compel a Ministry which was seeking to evade control by the Dail to face that body.

The powers, therefore, of the President are important; the Taoiseach is bound to keep him informed on matters of domestic and international policy; he takes precedence of every one in Eire, is supreme Commander of the Forces and grants all commissions therein, and exercises the power to pardon and commute sentences. He acts in these matters on the advice of the Government, but his high position is confirmed by his election for seven years by the people, and he should become a figure of great importance, by no means dwarfed by the Taoiseach, whose sobriquet is less happy than that of the President.

His exemption from all legal liability while in office, and his formal exemption from responsibility to Parliament exalt his position. Even for treason, or other high crimes or misdemeanours, all that apparently can happen to him is that, on the accusation of two-thirds of the total membership of the Senate, he may be removed from office by a vote of two-thirds of the total membership of the Dail. It is needless to speculate what then would be the fate of a President held guilty of treason.

As regards the Ministry, there is little innovation. The Government is to consist of not less than seven or more than fifteen Ministers; the Taoiseach is to be

elected by the Dail, and to choose with Dail approval the other members of the Government, but the President is to appoint: only two members may be Senators. The Taoiseach is made a dictator in his Cabinet, for the President must remove members who object to resigning when asked to do so, and it is now to be law that the resignation of the Taoiseach carries with it the resignation of the other members of the Government.

There is no undue tendency to control the Ministry; in international affairs it is not required to obtain the approval of the Dail, though agreements not merely of a technical or administrative character must be laid before it.

Echoes of current controversies with Britain are heard in the quite sound enactment that the State shall not be bound by any agreement involving a charge upon public funds without the approval of the Dail, and in the requirement that no agreement shall be part of the domestic law of the State save as determined by Oireachtas. To the Dail is given power to assent to the declaration of war, but the Government may take steps to repel invasion, summoning the Dail to meet.

The re-creation of a Senate is doubtless wise, but whether the new system of constitution will work better than the old must be left for experience to show. Its exclusion from any real power in respect of Money Bills, and its mere power of delay for ninety days in regard to other measures, are modified by the possibility of action to secure a referendum on issues of high importance. Yet the question must arise whether so weak a second house is worth having. But the last Senate did useful work in minor amendments, and the new may do the same, while the presence of University representatives will probably be of value.

The retention for the Dail of proportional representation is of high importance, for it presents a powerful obstacle to exaggerated representation of one party in that body; the present condition of representation in the British House of Commons clearly is wholly out of accord with the real state of opinion in the electorate. Unquestionably this is the most useful safeguard against extremism which Eire will possess.

Two new points must be noted regarding the judiciary. Mr. de Valera has disposed very neatly of the fundamental dilemma: how can the present judges, who are sworn to uphold the existing Constitution, give effect to the new, which ignores the restrictions imposed by the old on legislative power? Under the new Constitution the existing judges have the choice of retirement or of swearing to give effect to it, so that no dilemma will ever arise. The other point is the exclusive jurisdiction in matters of the validity of any law conferred on the Supreme Court, which is to be increased in size. It may be doubted if it is wise thus to deprive the Supreme Court of the great advantage of having before it the views of the High Court in matters of such importance.

Rights of the subject appear once more, but effective safeguards are as lacking as ever. Special courts and military courts are contemplated, and there is one very ominous clause requiring the State to endeavour to ensure that the Radio, the Press, and the Cinema shall not be used to undermine public order or morality or the authority of the State.

This is reminiscent of the days when even to discuss the action of Parliament was ruled seditious in English law.

It is more satisfactory to note the eminently sensible

principles laid down as to education, private property and social policy, though feminists will be horrified to note that women, no less than children, are to be safeguarded.

The restoration of the referendum for constitutional change, though with an interval of three years in which, unless the President vetoes the proposal, change may be made by simple Act, is to be commended. A simple majority suffices, however small the number of votes cast. But in the ordinary referendum provided for as possible on other Bills, the Bill is to be deemed accepted, unless rejected by a majority numbering at least 35 per cent. of the registered voters. It is evidently realized that voting at referenda may be low. The absence of the initiative will not be regretted, nor that of any provision for recall.

To the above, written on May 1, on receipt of the text, I have little to add, except as regards the views of Mr. J. A. Costello as spokesman for the Opposition. With his criticism of the rule that in case of doubt the Irish text of the measure is to prevail one cannot but agree, for the Irish text is a mere translation, which was so difficult to make that the appearance of the Constitution was delayed on that score. There is also much to be said for his objection to the deprivation of the High Court of the power to investigate the validity of a law, since it is to that Court that a citizen must appeal for vindication of his liberty.[1] But Mr. Costello's

[1] In the Constitution as passed, the High Court was given, as in the Constitution of 1922, the duty of dealing with constitutional questions with appeal to the Supreme Court. Other changes, all minor, include the right of either House to impeach the President, and the reduction to 33⅓ per cent. in place of 35 of the number of votes required to carry a negation of a law submitted to the referendum by decision of the President

objection to the right of the President to refer Bills for the opinion of the Supreme Court at his discretion is untenable; the fact that the Prime Minister and the Dail might be ready to enact undesirable laws is no reason why the guardian of the Constitution should not intervene to invoke the law. A much more legitimate objection would be that the Court would apparently be unable to pronounce unconstitutional any Bill which under Article 28 (3) was expressed to be for the purpose of securing the safety of the State in time of war or armed rebellion. But, as such Bills may be referred, the position is not clear, and it may be that the meaning of this provision is simply that, if assented to, a bill is beyond attack, not that it may not be referred in bill state and assent refused if found then unconstitutional in its provisions.

One serious difficulty undoubtedly exists. It is intended that the Constitution shall ultimately be open to amendment only by referendum, but how is this to be secured? Would the Courts decline to accept as law any Bill not so passed, or has the passing away of the supremacy of Imperial legislation destroyed the possibility of creating a rigid Constitution? The latter view seems clearly to be accepted by the Appellate Division of the Supreme Court of the Union in the recent case of *Ndlwana* v. *Minister of the Interior*.

One minor, and quite needless, inconvenience remains. A Ministry may be defeated and obtain a dissolution, at which it may be badly beaten, but it cannot

under Art. 27. The system of proportional representation had a curious effect, Mr. de Valera obtaining exactly half of the 134 seats, and thus becoming dependent for an effective majority on the 13 Labour members, who intimated that certain changes in favour of trade-unionism would be demanded as the price of support. The majority at the plebiscite for the Constitution was 685,105 to 526,945.

vacate office until its successors have been duly appointed after the reassembling of the Dail. The new Ministry thus cannot frame policy until after Parliament meets. It would have been quite simple to allow provisional appointment pending the meeting of the Dail. Rigidity is not always an advantage.

(*d*) BRITISH RELATIONS WITH THE UNION OF SOUTH AFRICA

18. THE UNION AND THE DESTRUCTION OF THE COMMON ALLEGIANCE

To the Editor of THE SPECTATOR, *10 January 1937*

It was the essential doctrine of the framers of the report of the Imperial Conference of 1926 that the bond of union between the units of the British Commonwealth of Nations consisted of a common allegiance, and this doctrine is formally recorded in the Statute of Westminster, 1931. In 1935 the Irish Free State, by the Irish Nationality and Citizenship Act, severed allegiance as the bond of connexion between Irish nationals and the Crown, and in 1936 the Constitution (Amendment No. 27) Act removed the Crown from any part in the internal sovereignty of the Free State.

A further step has now been taken in the destruction of the edifice of the Conference of 1926. The Government of the Union of South Africa has long been confronted by a demand from the Nationalist opposition, which is avowedly republican, and from those of its followers who have followed the Government on condition that they have full liberty to work for a republic from within the ranks of the governmental party, that Union nationals shall cease to have a double allegiance as British subjects and Union nationals. Dr. Malan has insisted that Union nationals shall be declared not to be British subjects, and the replies of General Hertzog to this demand have been marked by the most remarkable obscurity.

The position has now been made clear. We have been allowed to learn, via a communication made to the Union Parliament, that the discussion of the changes to be made in the coronation ceremonial to meet the

new position of the Dominions has resulted in the decision that His Majesty at his coronation shall be required under a Union statute to take a distinct oath in respect of the Crown of the Union.[1] It might have been hoped that at such a vital moment the unity of the Commonwealth should be allowed to stand. But the Union demands that the King should be marked out as on the one hand King of the United Kingdom and on the other as King of the Union. That this would be done was, of course, foreshadowed in the decision that the King should officially be toasted separately in his two capacities.

The essence of the matter is that allegiance of Union nationals is thus allegiance not to the King of the United Kingdom and those other parts of the Empire which accept, as do Canada, Australia, and New Zealand, a common allegiance, but to the King of the Union, between whom and British subjects there is no bond of allegiance. The position of the Union is now really assimilated to that of Hanover before the separation of the Crowns. There was then no common allegiance, for British subjects owed no allegiance to the King of Hanover, and Hanoverians in Hanover were not British subjects. Great credit is due to the ingenuity with which Generals Hertzog and Smuts have accomplished a result equivalent to that achieved by Mr. de Valera in 1935 without involving the resentment aroused by that statesman's legislation.

Union nationals, of course, like Irish nationals,[2] will still be deemed British subjects by British law outside the Union and the Free State, but the definitive and formal separation of the Crowns, now to be made patent in the coronation ceremonial with the approbation

[1] As sovereign of the Union.

[2] See no. 15, *ante*.

of the King and the British Government, which, as is now usual, confronts Parliament with a *fait accompli*, raises a serious issue. The Union Government has been moved by the break-down of collective security and the destruction of Ethiopia to greater appreciation of British naval power and is to share in the Imperial Conference in May. There is serious danger lest the British Government in its constant anxiety to conciliate may do so at the expense of the Native Territories of South Africa and pledge itself to their transfer. It is hardly necessary to point out that it would be grossly improper to transfer to a distinct Crown without their assent natives who accepted the protection of the British Crown in order to save themselves from the domination of the Dutch Republics. The doctrine of trusteeship for native races is still professed by the British Government, and respect for it forbids handing over the Territories against the will of their people to a Government which stands with complete consistency of principle and practice for the subordination of native to European interests.

19. THE COMMONWEALTH AND THE CROWN

To the Editor of THE SPECTATOR, *23 January 1937*

May I correct briefly some of the misconceptions in the letter in your issue of January 22 on the Commonwealth and the Crown?

1. The allegiance of political units to the Crown is nothing more or less than the allegiance of the people of these units to the Crown. That is the only allegiance known to the law, and the Imperial Conference of 1926 was fully aware of the fact when it wrote: 'The members of the Commonwealth are united by a

common allegiance to the Crown. This allegiance is the basis of the common status possessed by all subjects of His Majesty.' It is simply contrary to fact to say that the action of the Free State in severing allegiance between Irish nationals and the Crown was not a severance of the common allegiance of the 1926 report.

2. It is equally contrary to fact to assert that I anticipate grave practical consequences from the separate oath to be taken by the King in respect of the Union. This insistence on the separate character of the British and the Union kingship is completely in keeping with the whole policy of the Status of the Union Act, 1934. It is naturally disliked by the Dominion party in the Union, but I doubt whether even that party anticipates grave practical consequences from it. Certainly I do not.[1]

3. The position as regards the Native Territories in South Africa is completely misunderstood. It is not true that, if the territories had been transferred to the Union, the Union Parliament would have had complete power in law and in convention to govern or misgovern them at its pleasure, subject to any contractual arrangement that might be made at the time of handing over. The power of the Crown to transfer the territories rested wholly on the South Africa Act, 1909, and under it they would have had to be governed by the Governor-General in Council subject to statutory, not contractual, conditions, which reserved the right of the Crown to disallow any Union legislation by the Governor-General in Council, and required the reservation of any Bill seeking to alter the provisions affecting the

[1] British and Dominion criticism forced the Union to accept a single oath; see no. 10, *ante*.

Government. All this has definitely become impossible of effective execution since the Statute of Westminster, 1931, opened up the way to the Status of the Union Act, 1934. The doctrine of distinct Crowns renders transfer of the Native Territories without the assent of their people wholly indefensible. Their acceptance of the authority of the British Crown gives neither legal nor moral right to hand them over to the Union Crown, whose connexion with the British can be extinguished by a simple Act of the Union Parliament, unless they so desire, as at present they certainly do not.[1]

4. So far as I know, no statesman in Britain would be foolish enough to attempt to foist any interpretation of the Commonwealth symbol—the Crown—on Mr. de Valera contrary to his views. At the same time it is impossible to apply the principles which suit the Free State to Canada, Australia, or New Zealand. It cannot be suggested to these Dominions that they should extinguish the status of their nationals as British subjects and arrange in lieu a system of reciprocal grants of specified rights. The system would be intelligible only if the United Kingdom declared Dominion nationals not to be British subjects, and restricted their rights in the United Kingdom to those granted to United Kingdom nationals in the Dominions. This illiberal and narrow conception, will not, I am certain, commend itself to our statesmen.[2] The dangers of driving bargains between units of the Empire was made clear enough at Ottawa in 1932, and, if the Dominions seem sometimes less appreciative of British generosity than might be desired, that is no reason for withholding it.

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 66–78, and no. 21, *post*.

[2] See no. 24, *post*, for the correctness of this view.

5. The truth is that allegiance to the King is a most effective and simple bond of connexion between all of us who value the Crown. It involves no idea of inferiority of any unit's people to those of another, and the hostility to it comes essentially from those who, like Mr. de Valera, prefer a republic to a monarchy. By all means let us co-operate with the Free State and the Union, but do not ask us to discard allegiance as the bond between us and the greater Dominions except on their initiative. The effort to render uniform Commonwealth relations runs foreign to the whole genius of the Constitution. Let us trust the Dominions, not seek to bind them by contract.

20. SOUTH AFRICA AND NEUTRALITY

To the Editor of THE SCOTSMAN, *3 April 1937*

1. We owe to the much derided efforts of the small Dominion Party in the Union of South Africa the categorical and most welcome assurances regarding the defence of the Imperial naval base at Simonstown recorded in your issue to-day. It is but a few weeks ago when, questioned in Parliament on the subject, General Hertzog declared that Mr. Pirow had not on his visit to London in 1936 renewed or reaffirmed the pact made by General Smuts, leaving the matter thus in complete dubiety. We have now, unquestionably as the result of the continued efforts of the Dominion Party, for the first time, the most categorical public affirmation that General Hertzog's Government is pledged to the pact as a definite, solemn, and honourable agreement with the British Government. The ultimate cause of this attitude is unquestionably the destruction of Ethiopia by Italy, which has impressed on the Union the

advantages of naval protection by a Great Power, and it is one of our compensations for our enormous and inevitably wasteful expenditure in rearmament that the Union Government realizes our strength.

2. General Hertzog's attitude was due to the fact that he had committed himself to approval of an article by Dr. Bodenstein, the Secretary for External Affairs,[1] under his immediate control, in which that official had expounded his superior's doctrine of the divisibility of the Crown, showing *inter alia* that the Union was fully entitled to remain neutral in a British war and could 'walk out of the Commonwealth at any moment without notice even'. But the statement of Mr. Pirow destroys the whole value of this contention. It is perfectly possible to argue that a Dominion might claim to be neutral in a British war. The Commonwealth is *sui generis*, and it is idle to assert that any precedent exactly applies. But it is simply absurd to hold, as does General Hertzog, that in a British war the Union can defend the naval base and yet claim the rights of neutrality. Here we are in the familiar region of international law, as he himself contends, and the evidence on which he relies consists of a dubious precedent of 1788 and an assertion of Canning in 1826, on which I commented in your columns in April 1935.[2] Against this must be set all modern practice and all modern theory; and, it must be added, Mr. de Valera, whose legal advice is always able, has candidly admitted that the Free State could not expect any Power to recognize her neutrality so long as she permits British use of her territory. It may be hoped that Mr. Pirow has shown General Hertzog

[1] Printed in *Europäische Revue*, Dec. 1936.

[2] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 70–8.

the error of his opinions.[1] At any rate, after the pledge now given, talk of neutrality becomes as absurd as Dr. Bodenstein's affirmation of the right to leave the Commonwealth without notice. A party which, like the Dominion Party, has secured this change of stand has proved its utility.

3. General Hertzog has added to the complications of the position of the Union in South-West Africa by his hope that, when the Union's mandate expires, the territory will join the Union with Germany's consent. This can only be interpreted by lawyers as a formal admission by the Union that under Article 22 of the League Covenant a mandated territory can be held in mandate only until its people can stand alone. The people, of course, in this case are the Europeans, for the Union has never countenanced the idea that it is the natives for whose benefit the mandate exists. The theory is clearly adopted as a mode of circumventing the issue of sovereignty. The Union, it must be remembered, in 1930 yielded to the firm opposition of the League Mandates Commission to the claim of sovereignty by altering the legislation of 1922, which ascribed to her dominion over the railways of the mandated territory, and her claim that a mandate implies sovereignty is not shared by the United Kingdom or Australia. But, on the new suggestion, the same result can be achieved, for as the British population in South-West Africa can soon be regarded as capable of standing alone, it will be entitled to ask that the mandate be ended, when it will be free to ask incorporation in the Union. Germany, of course, has weakened her

[1] On the contrary, on May 26 at Kroonstad he reasserted General Hertzog's doctrine that the relation of the Union to Simonstown was that of Spain to Gibraltar, the absurdity of which is shown in *Letters on Imperial Relations*, 1916–35, p. 350 f.

position seriously by the accord as to nationality in 1923, but one cause of Mr. Pirow's friendliness to Britain doubtless lies in the hope of securing British aid in resisting the German claims. 'It 's an ill wind that blows nobody good', and the only danger of the *rapprochement* is that we be tempted to sacrifice the interests of the native territories in the desire to show appreciation of the new solidarity. There are grave objections to generosity at the expense of others, and the transfer ought certainly to await that development of a wiser native policy, which we are promised but of which so far we have seen in practice nothing whatever.

21. SOUTH AFRICA AND THE NATIVE TERRITORIES

To the Editor of THE SCOTSMAN, *7 July 1937*

1. General Hertzog's outburst is explained, not excused, by the fact that it is due to failure in the chief purpose which he sought to achieve at the Imperial Conference.[1] Fortified by Dr. Bodenstein, the authorized exponent of the doctrine of the right to walk out of the Commonwealth without notice, he hoped to induce the British Government so to amend the British Nationality Act that Union nationals should no longer be British subjects, but have but one allegiance. The reason, of course, is simple. Secession and neutrality must be imperfect so long as, legally, whatever is done by the Union Parliament, Union nationals outside its limits remain British subjects, as do even now Irish citizens outside the Free State. The British refusal to act leaves a difference between the position of the Union and that of such a State as Germany, which

[1] See no. 24, *post.*

General Hertzog regards as incompatible with his claim of absolute independence.

2. The Union has no right whatever to the transfer, and there is no truth in General Hertzog's assertion that the Union's right to the transfer of the administration is indisputable. When the Union was formed, provision was made in identic terms by ss. 150 and 151 of the South Africa Act, 1909, for the possibility of the admission to the Union of the British South Africa Company's territories, and of the transfer of the Government of the native territories. No promise of any kind was made, and, in the case of Rhodesia, in view of the objection of the people to transfer, no action was taken. In the case of the territories in native occupation the idea of transfer was at the time so obnoxious that chiefs visited England and received, with King Edward VII's full approval, assurances from Lord Crewe that no promise of transfer had been made.

3. Not only was no promise given, but transfer, if it took place, was made subject to definite conditions embodied in a schedule to the Act, to safeguard the natives, including the right to disallow any measure disapproved by the British Government. The Union Government has under the Statute of Westminster abolished the power of disallowance, and I ascertained definitely from its accredited representative in 1935 that it would not consider it compatible with its status to enter into any agreement with the British Government, giving the latter any right to secure the carrying out of the terms of the schedule. Moreover, when transfer was mooted in 1909, the belief in British circles was that the Union native policy would be more enlightened than that of the former Colonies; that the Cape native franchise would not merely be maintained, but that Cecil

Rhodes's doctrine of equal rights for all civilized men —for which my colleague, Professor Basil Williams, has given him due credit—would ultimately be established. As I have pointed out,[1] not only has General Smuts abandoned a principle which he once most vehemently defended and secured the abolition of the Cape native vote, but he has allowed General Hertzog to violate the promise that no native Bills would thereafter be passed without prior reference to the Native Representative Council, and to impose further grave disabilities on the natives. Even under the supervision of the League of Nations, the Union has, according to the Report of its own Commission on South-West Africa, conspicuously failed to provide for native progress.[2]

4. There is no truth in the allegation that the British Government has failed to give effect to the plan of co-operation devised in 1935.[3] The natives firmly declined

[1] The Native Laws Amendment Act is intended to give the executive authorities power, free from judicial control, to remove natives deemed superfluous from urban areas to the reserves, which are already wholly inadequate, so that they will have no means of livelihood save by accepting any wages farmers care to give. 'Fusion', Sir J. Rose-Innes has said, 'can only do its perfect work over the prostrate body of the native.' The new policy is one of repression and exploitation, and Mr. Pirow's demand that it be substituted in East Africa for that of trusteeship, though it has support among the settlers of Kenya, is wholly inconsistent with British policy and contradicts the terms of the mandate on which Tanganyika is held. See Mr. C. W. A. Coulter, *Assembly Debates*, 1937, pp. 6912 ff., for a convincing indictment of recent policy.

[2] It is interesting to note, in view of General Hertzog's present attitude to the German desire for the restoration of South-West Africa, that he originally denounced the idea of annexation of the territory to the Union as 'a scandalous piece of international fraud', and declared that it rested with the Germans in the territory to decide in future whether they would join the Union (*J.P.E.* 1921, pp. 909, 914). See no. 20 (3), *ante*.

[3] The Dominions Secretary replied fairly to General Hertzog on July 9, but exhibited a somewhat undignified anxiety to placate his

to accept Union pecuniary aid simply because they knew that this must compromise their desire to remain under the Crown of the United Kingdom. I cannot conceive what moral right the British Government has to transfer to a completely independent Government, which claims the right of secession, tribes, who are in part British subjects and in part voluntarily under British protection, without their consent. The position is exactly as in the case of the Indian States, in whose case Britain has definitely accepted the impossibility of alteration in their direct relation with the British Crown without their assent.

5. The legal claims made by General Hertzog arise from the fact that under the Royal Executive Functions and Seals Act, 1934, of the Union, any function of the King in Council under the South Africa Act, 1909, can be performed by the Governor-General in Council, and there is no saving for s. 150 or s. 151 of the Act. This is very striking, because the Status of the Union Act, 1934, saved these clauses, and in April 1934 I stressed the effect of the new Bill, and suggested that the British Government should press for amendment.[1] On May 7 the issue was raised on the Dominions Office Vote, and Mr. Thomas gave an assurance, based on the advice of the Law Officers, that the Union measure could not affect the position of the King or empower transfer save on British advice and by the King in Council. While I still think amendment should have

critic. Efforts to extract from him a distinct promise that the consent of the natives would be required, and not merely consultation, failed on July 13. It may be added that the suggestion of Mr. Lionel Curtis and others, that Britain will be forced to hand over the territories, assumes a cowardice in the British Government which no Labour Government would display and probably few Conservative Governments, despite the remarkable development of the plea for peace at any price.

[1] Keith, *Letters on Imperial Relations*, 1916–35, pp. 169, 170.

been pressed for, I do not doubt that the power still can be exercised only on British advice.

6. For General Hertzog and the Union Parliament to ask the King to override his British Ministers, or to put pressure on them, is to ask His Majesty to act wholly unconstitutionally. The British Government claims no right whatever to ask the King to put pressure of any sort on any Dominion Government, and it is entitled to like treatment. The Union has a simple mode of securing its ends. Let it adopt a wise and generous native policy, and the people of the territories will be as eager to be transferred as they now are reluctant. Moreover, the Union may properly be reminded that it relies entirely on the British Navy for the maintenance of its security from aggression, and that, as an independent State, all Mr. Pirow's hectic planning would avail it little against foreign Powers with strong navies.

7. General Hertzog's attitude is a curious commentary on the official assurances of harmony at the Imperial Conference, but it is eloquent testimony to the growing strength of the Nationalist element in the Union, which has recovered rapidly from the first effects of the fusion.

(*e*) THE IMPERIAL CONFERENCE OF 1937

22. THE CONSTITUTIONAL ISSUES FOR THE CONFERENCE

MANCHESTER GUARDIAN, *17 May 1937*

1. Of the questions before the Imperial Conference one alone has immediate interest for others than students of constitutional and international law. The Natal Provincial Council has passed, and a mass meeting of citizens in Durban has with like unanimity endorsed, a protest against any tampering with the question of British nationality. They fear that the importance of the question may not be realized in the United Kingdom, and in this fear they have probably justification. The question involved is in fact one of the essential bond between the peoples of the King. The famous Balfour declaration in 1926 of Dominion status stressed that unity rested on common allegiance, and on that allegiance the British Government has based its steady adherence to the position that, though the Dominions are distinct units in international law, the relations of the several parts of the Empire *inter se* are not subject to international law. To weaken the bond is, therefore, a matter of deep interest outside the Union, but it appeals especially there, because the Nationalist Party, which claims wide sympathy from members of General Hertzog's following, and which is plainly destined to play a great part in the future, is pledged to eradicate the conception of British nationality in the Union. General Hertzog himself dislikes any division of nationality; he has developed a theory that there is but one nationality in the Union, though there exists a common status between Union and British nationalities. Legally, of course, his position is quite untenable.

The Union itself in the British Nationality in the Union and Naturalization and Status of Aliens Act, 1926, placed beyond doubt the existence of British nationality therein, and General Hertzog's Union Nationality and Flags Act, 1927, made no attempt to affect the earlier Act. As in Canada, the two nationalities exist side by side in a manner which seems wholly proper as a symbol of the two allegiances to the Union and the British Commonwealth. The Irish Free State, of course, has so far as it can destroyed British nationality therein, but the precedent is so plainly induced by hostility to the Commonwealth that it is inevitable that those in the Union of British race should deeply resent the idea that the Union should declare them no longer British subjects, or British nationals. In English law the two categories are inseparably united. There would, of course, be an easy solution if the term British were not so much disliked by Nationalists in the Union. The term British nationals would be assigned to denote the common status, and the United Kingdom and the other units could have nationalities of their own so described, thus removing any appearance of inferiority of the Dominions to the United Kingdom. The suggestion that 'subjects of the King' might denote the common status has no attractions for the British of Natal, for, as General Hertzog made it clear in his Abdication Act, the King of the Union is juristically quite distinct from the King of the United Kingdom.

2. In the Union also there is the desire for further emphasis on sovereign independence and recognition as a State of international law. The revival of Mr. A. Fisher's suggestion at the Imperial Conference of 1911 that the Dominions should be placed under the sphere of operations of the Foreign Office has a good deal to

be said for it. The Foreign Office, it is understood, in effect deals directly with the Dominions, inasmuch as the Dominions Office no longer exercises the function of framing communications on external issues to the Dominions. The perpetuation of that Office from the British point of view accords with the doctrine that the relations of the Empire are not international in character; but that aim could more satisfactorily be attained by making all inter-Imperial issues part of the functions of the Prime Minister, and attaching to his department a Parliamentary Secretary to perform that portion of the work which at present does not reach him. This could be done without increasing his real burden, and it would be appropriate because foreign affairs are necessarily already the subject of constant consultation between the Prime Minister and the Foreign Secretary. The Dominions Office as a post-box between the Dominions and other Government departments is no doubt useful, but, if Dominion sentiment prefers a change, there could be no reason to resist the desire.

3. Other issues are more difficult. There is still a strong feeling in the Union that her international status is not yet clearly enough expressed or appreciated outside the Empire. It may be granted that even the most accomplished writers outside this country on international law speak with some uncertainty on the full character of Dominion status. But their reserves arise inevitably from the actual state of affairs and the views of Dominions other than the Union and the Irish Free State. The Free State, of course, claims absolute independence, and has asserted it in the legislation of December last no less than in the draft Constitution of April. She holds that her connexion with the Crown

rests entirely on her free will, for Mr. de Valera has definitely jettisoned the Treaty of 1921 on the doctrine popularized by Herr Hitler, that a compact secured by threat of war or by war is without binding force. She also, therefore, claims the right of neutrality, and resents the fact that the Treaty imposes conditions authorizing British use of her territory for defence purposes, which would render it impossible for her successfully to claim respect for her neutrality in a British war. General Hertzog equally claims the rights of secession and neutrality; but can he hope to have these claims homologated by Australia or New Zealand, which are impelled by every instinct of self-preservation to cherish intimate relations with the United Kingdom, or even by Canada, which, assured of her autonomy and security, has no desire to fetter her action by any definite attitude on this theoretic issue? Something might be done to emphasize the status of the Dominions; they might rename themselves, Kingdom of the Union of South Africa, Kingdom of Canada, and so on. John Adams and John Macdonald would have approved in their day of like action. But the only way, apart from actual secession, to place beyond cavil the international status of the Dominions would be to convert inter-Imperial relations into international relations by placing the parts of the Empire on the basis of members of an alliance of the type of the Little Entente, whose members are individually sovereign, though bound closely together. But would this meet the wishes of the Dominions? It would mean substituting for their present freedom the bonds of a definitive alliance with complete negation of the possibility of secession at pleasure, and of *de facto* if not *de jure* neutrality in British wars. It is, of course, a matter for the Dominions to

decide, but it is very difficult to see what they could gain by any such change.[1]

4. In the same way it is difficult to see what change in treaty procedure can be made without serious disadvantage. Should the Governor-General in each Dominion be empowered to exercise the prerogative in external affairs, thus eliminating the necessity of obtaining the signature of the King to full powers and ratifications and letters of credence? The royal action can already be dispensed with by the Union and the Free State. But is it really desired thus to ignore the Crown, and would any practical advantage thence be derived? For practical purposes no difference would be made. The Dominions have absolute power to conclude their own treaties, and the services of British diplomats are placed generously at their service when they do not care to go to the expense of maintaining legations overseas or accrediting special envoys. It is indeed difficult to see precisely what further concessions there are to make; but, if there are any, it may be assumed that the British Government will accord them,

[1] It is interesting to note that a most determined effort was made in September 1935, defeated only by 27 votes to 21, to declare Australian neutrality in regard to the Ethiopian war, to repudiate all obligation to support the League of Nations in its sanctions policy, and to recall H.M.A.S. *Australia* from service under the Admiralty. The Attorney-General, Mr. Menzies, characterized as nonsense the claim of Mr. Brennan for Labour that Australia was an independent nation with the right to declare war and peace, and expressed his approval of the writer's statement: 'For a Dominion to declare its neutrality in a war to which the British Crown is a party would be tantamount to secession' (cf. *Const. Law of British Dominions* (1933), p. 133). In the protracted debate in January and February in the Canadian House of Commons on the issue of neutrality, Mr. Mackenzie King and Mr. Rinfret, Secretary of State, regarded the idea as impracticable (*J.P.E.* 1937, pp. 302 ff.). Even in the Union of South Africa the debate in May 1936 showed that neutrality had ceased to appear so attractive to any except the out-and-out Nationalists (*J.P.E.* 1937, pp. 167 ff.).

for, as the Attorney-General for the Commonwealth of Australia recently remarked, there is no policy more consistently followed by the Dominions Office than that of deference to any desire of the Dominions. Whether, of course, the further disintegration of the Commonwealth will in the long run benefit the Dominions themselves, it must be left to history to show.

23. GENERAL HERTZOG'S HOSTILITY TO BRITISH NATIONALITY

To the Editor of THE MORNING POST, *21 May 1937*

As the correspondent of *The Times* at Capetown charges[1] those in Natal and on the Rand who protest against any diminution of their right to be styled British subjects with confusion of thought, may I point out that the confusion exists only on the part of the correspondent himself, and that there is a serious issue at stake?

1. There is no truth in his allegation that 'the citizen of any Dominion is a national of that Dominion but also a British subject'. In three Dominions, Australia, New Zealand, and Newfoundland—whose status is only in abeyance not destroyed—there are no nationals, but only British subjects who are also British nationals, the two being synonymous. In the Irish Free State citizens are, so far as the Free State can secure the result, not British subjects. In Canada there are British subjects who for certain purposes are also Canadian nationals, but no Canadian Government has raised any difficulty regarding double nationality. To many Canadians the position appeals as signifying at once their membership of the British Commonwealth of

[1] *The Times*, 21 May 1937, p. 14.

Nations and their closer connexion with Canada. The only Dominion which seems, as regards the dominant section of its people, to resent the position is the Union of South Africa, whose Prime Minister is quite consistent in his attitude,[1] as the status of British subjects is hard to reconcile with the claim to be neutral in a British war and to walk out of the Commonwealth without notice.

2. In the Union under its own law, passed as recently as 1926 by General Hertzog himself, the vast majority of the people are British nationals in the Union, and, by a further law of 1927, which in no way purports to alter the Act of 1926, they are also Union nationals; a few persons may be Union nationals who are not British subjects in the Union. All that is said about a confusion between common status and common nationality by or for General Hertzog is remote from reality, and rests on his totally unsupported denial of the existence of British nationality. He contradicts his own statute of 1926, and the legislation of the United Kingdom and of the other Dominions. The people on the Rand and in Natal are protesting against the destruction of their British nationality, and to deny the reality of the grounds for their protest is unjustifiable. It is open to General Hertzog to deprive British nationals,

[1] General Hertzog on April 6 made it perfectly clear that he disliked the term British subject as applied to Union nationals, and that it must disappear. The term must be reduced to the meaning 'a subject of Great Britain', and Dr. Bodenstein, the exponent of the doctrine of neutrality and secession without notice, had prepared amendments to the British Nationality and Status of Aliens Act, 1914, to effect that end. He stated—what is wholly contrary to fact—that the British Government in 1914 felt that it was necessary for the Dominions to have a nationality of their own, and he repeated his view that there was a distinction in the British Act between British nationality and the position of a British subject, which again is completely contrary to fact. See also Mr. Marwick's effective attack, *Assembly Debates*, 1937, pp. 1667 ff.

who are also Union nationals, of their status as British, and to make them aliens as Mr. de Valera has done, but one may hope, if not believe, that the Prime Ministers of the other Dominions will endeavour to induce the Union Prime Minister not to proceed to this act of hostility to the name 'British', and to the solidarity of the Commonwealth.

3. To obviate further confusion due to the editorial reference in *The Times* to the Status of the Union Act, 1934, I may point out that that measure makes no attempt to affect British nationality in the Union. It merely carries to a logical conclusion the change earlier made in franchise through confining it to Union nationals by applying the same principle to membership of Parliament,[1] which it expressly leaves open to those who have acquired Union nationality 'by domicile as a British subject'.

24. THE CONSTITUTIONAL RESULTS OF THE CONFERENCE

14 June 1937

There will be little regret that the Imperial Conference Committee on Constitutional questions found itself unable to homologate the plans of General Hertzog for the reduction of the term 'British subject' to a

[1] Canada deliberately keeps British nationality as the qualification for franchise and membership. Unless and until Dominion nationals cease to be British subjects in the eyes of British law, a declaration of neutrality or of secession could not for that law take full effect as regards the position of such persons outside their territory. They would remain British subjects, whose position as enemies of the King's enemies, and as the King's subjects, could be altered only by Imperial action, involving legislation. Dominion laws outside Dominion territory, though given extra-territorial effect by the Statute of Westminster, 1931, s. 3, cannot override competing British legislation, the voluntary restriction of British legislative authority under ss. 2 and 4 of the Statute having no reference to anything save law within a Dominion and as part of its legal system.

description of persons connected with the United Kingdom only. It was not, we learn, suggested that any change should be made in the existing position regarding the common status described by that term. But it was argued that, in the absence of rules for determining that part of the Commonwealth with which any person has a particular connexion, difficulties might arise with regard to such matters as immigration, deportation, diplomatic action, treaty rights and obligations, and extra-territorial legislation. It was suggested that the difficulties would be overcome, if each of the members of the Commonwealth were to undertake to introduce legislation, as had already been done in Canada, the Union, and the Irish Free State, defining its nationals or citizens. The proposal, of course, was definitely intended as an authority for the doctrine, so constantly preached by General Hertzog, that there is one nationality only, that of each Dominion, and that there is no British nationality to compete with it but merely a common status. Happily this attempt received no effective support. Some members, we are told, were not inclined to introduce any such legislation; Australia, New Zealand, and the United Kingdom itself may well have declined to destroy British nationality, and to substitute the narrower conception of an Australian, a New Zealand, and a United Kingdom national, even if supplemented by a common status of a practically meaningless kind. General Hertzog, therefore, has received no shadow of authority to destroy British nationality in the Union. He has the power to force such a measure through Parliament, but he has asked for and has been decisively refused the imprimatur of the Imperial Conference for such action. We may hope, though not expect, that we may hear no more

that the Imperial Conference approved the extinction of British nationality as appertaining to the peoples of the Dominions.

The agreement reached as to what persons should be regarded for the purposes above mentioned as essentially connected with any Dominion is clearly sound. Normally each member will include as members of its community, or, in popular phraseology, its subjects, persons who were born in its territory, or became naturalized therein, or were made subjects by annexation, and still reside there, and persons who, arriving as British subjects from other parts of the Commonwealth, have identified themselves with the community to which they have come. This affords a rough and ready criterion for distinguishing, e.g. in France, between those British subjects who may properly apply to the British Ambassador in case of denial of treaty rights, and those Dominion nationals who should resort to the Irish Free State or Union or Canadian Minister and seek protection under their treaties with France. The plan is simple enough, though not perhaps easy to work out in practice, but no objection need be taken to it.

Unfortunately there is no suggestion that the one really useful point has been effected. The inability of the British Government to return to the Free State indigent Irish citizens is a minor scandal, which is not mitigated by assertions of successive Secretaries of State that the matter is under full consideration. Legislation has long been morally justified to make good the lacuna in legal machinery created by the attainment by the Free State of Dominion status.[1]

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 52, 53.

No question arises as to the justification of the further finding of the Conference that, where different members of the Commonwealth become parties to the same multilateral treaty, each member is free from all responsibility in respect of the actions of any other part. This is a mere result of the new international status of the Dominions which exempts Britain and the Dominions for responsibility for any save their own actions.[1] The decisions as to the criterion of connexion between any part of the Empire and British subjects will play a useful part in clearing up the issue to which member of the Commonwealth a foreign State must apply for redress in case of wrong-doing by a British subject.

On the other hand, there must be noted with much satisfaction the emphatic declaration by the United Kingdom of its determination to refrain from creating any distinct classes of British subjects, parallel to the ideas of 'nationals', or 'citizens', or 'members of the community'—a new phrase—in the case of the Dominions. The diplomatic and consular agents of the British Government will continue as in the past to afford aid to all British subjects, though nationals of the Dominions, in any places where there are no such Dominion representatives—that is in by far the greater number of foreign countries, and it assumes that Dominion diplomatic and consular representatives will be ready to aid other Dominions or the United Kingdom in like manner. This is a most interesting assertion[2] of the continued unity for certain vital purposes of the Commonwealth, and it explains why Mr. de Valera has not ventured to sever the bond. No doubt the British Government would claim for Dominion

[1] Keith, *Const. Law of the British Dominions* (1933), pp. 73, 74.
[2] Parl. Pap. Cmd. 5482, p. 24.

nationals any special advantages due under treaties of the Dominions affecting them, in addition to the rights of British subjects. There is, of course, a precedent of importance. In the arbitration over the case of the illegal sinking of the Canadian vessel *I'm Alone*[1] the British Government insisted that it was a matter purely of domestic interest which Government presented the claim, and stated categorically that the settlement reached by Canada would of course dispose of British claims connected with the United Kingdom. Amid much that seems negative, this aspect of the Conference deserves prominent mention. On the other questions mentioned above[2] no such accord was achieved as to render action possible.

[1] *B.Y.I.L.* 1936, pp. 82–111. [2] See no. 23.

(*f*) BRITAIN, INDIA, AND BURMA

25. INDIAN NON-CO-OPERATION

To the Editor of THE SCOTSMAN, *1 April 1937*

1. It is the essential merit of Mr. Gandhi and of Congress at his initiative that it has studied the principles of responsible government and that it realizes, what Sir S. Hoare has never grasped, that it is wholly incompatible with executive safeguards. It is not as if there were not abundant evidence to prove the truth of this assertion. It is possible in certain spheres of activity to deny control of a subject-matter to a Legislature. Britain in this way shut off the colonies which had self-government from control of merchant shipping down to 1931, of copyright down to 1911, of nationality to almost our own day, and of foreign enlistment and extradition. She retained control of foreign affairs down to the war of 1914, and of defence so long as she maintained local garrisons. But in the field of executive authority,[1] whether in Canada as shown by Lord Metcalfe in your citation, in New Zealand, in Western Australia, in Newfoundland, or Natal, executive safeguards failed utterly. The Government of India Act, 1935, suffered, therefore, from the first from the grave defect that, while the British Government insisted that it was conferring responsible government, it made responsibility unreal by placing special responsibilities on the Governor, including the maintenance of peace and tranquillity, the protection of the services, the interests of minorities, and the prevention of executive discrimination against British trade. All appeals to the Ministry to give within clear limits legislative safeguards to be operated by the Courts proved unavailing.

[1] Keith, *Responsible Government in the Dominions* (ed. 1928), i. 212 ff.

2. Responsible government could, no doubt, have been introduced, but only on the lines suggested by Mr. Srinivasa Sastri, the adoption of a constitutional understanding that the special responsibilities of the Governors would be restricted in operation to matters of the gravest character. To say, as Lord Erskine and Lord Brabourne did, that they would give Ministers all possible help, sympathy, and co-operation within the four corners of the Act, is meaningless, for the Act itself gives powers to, and imposes duties on, the Governor which, interpreted in one quite legitimate way, would reduce ministerial responsibility to a farce. It is regrettable that the Governors were not authorized to give very much more definite pledges, which might have weakened the solidarity of Congress opposition, for we are entitled to believe the Ministry when it assures us that it really desires to see a wide measure of responsibility entrusted to the people of India.

3. Minority Ministries, of course, are a negation in terms of responsible government, which means government by Ministers who have the support of the majority of the Legislature, and, if deadlock results, the sooner the Governor takes over charge the better. The forms of responsible government should not be misused to conceal its break-down.

4. It may be hoped, though it cannot be expected, that the state of affairs revealed by the elections will induce the Government to pause before seeking to set up the federation, with its clear intention of stereotyping autocracy and the absence of the rule of law in the States, in return for the aid of the Princes in defeating Indian strivings for self-government. The Simon Commission was perfectly sound in holding that a Central Government under official control was essential when

responsible government was being attempted in the provinces. We have that now, and it should be maintained intact until the situation becomes much clearer than it now is.

26. NON-CO-OPERATION IN INDIA; LORD ZETLAND'S BLUNDER

To the Editor of THE SCOTSMAN, *9 April 1937*

It is very difficult to understand how Lord Lothian can believe that the leaders of Congress do not understand the working of responsible government. So well do they understand the position that they framed the resolution of March 18 with such adroitness as to induce Lord Zetland to give singularly unhelpful instructions to his Governors. The demand made by Congress was, on the face of it, not improper. It was simply that 'the Governor will not use his special powers of interference or set aside the advice of Ministers in regard to their constitutional activities'. If the word 'constitutional' had been interpreted in its proper sense, i.e. in accordance with the spirit of the Constitution, the Governors could have replied that of course they would not use special powers or disregard such advice. Constitutionally, Ministers are bound to preserve tranquillity; not to neglect or oppress minorities; not to ill-treat the Civil Services; not to corrupt the administration of justice; not to injure the interests of the States. The special powers, they could have pointed out, are solely intended to meet cases of unconstitutional action, which they could not contemplate as intended. As the matter has been handled, it is not surprising if Indians feel that the assurances given by Sir S. Hoare are being violated at the start. Rectitude in human relations is not enough;

tact is necessary, and the task of Governors is made infinitely harder by their subordination to the Secretary of State's telegraphic control and the necessity of co-ordinating action throughout the provinces.

Lord Zetland defends the constitutionality of the finding of Ministries by the Governors. He is clearly right, but on one condition only, namely, that Ministers meet the Legislatures with the minimum delay. There is no possible excuse for any but a short period to allow a programme to be put together, and the fact that *prima facie* the Ministries have not the confidence of the Legislatures places on the Governors and Ministers alike a constitutional obligation to meet them with the least possible delay. If they fail to do so, both alike will be guilty of a deliberate breach of responsible government. I doubt if Lord Zetland contemplates delay; if he does, he is putting himself and the British Government entirely in the wrong.

The Constitution does not contemplate rule by a Ministry in a minority in the Legislature. If, then, the new Ministries cannot obtain a majority, the Governors must again try to form Ministries from the majority parties. If they refuse, then the contingency carefully provided for by s. 93 of the Constitution plainly arises, and the Governor must take over charge. It cannot be said even that in refusing to form Governments the Congress Party is in the wrong, for, apart from its fundamental objections to the Constitution, the blundering of the India Office enables it to say that the Governors have refused to promise not to interfere in constitutional activities. It is, indeed, deplorable that good intentions should be so badly carried into effect.

27. THE VICEROY'S PRONOUNCEMENT: A CONSTITUTIONAL ERROR

To REUTER'S, *22 June 1937*

While there must be general agreement with the Viceroy's assurance to Congress that the acceptance of office would afford Ministers ample scope for the exercise of responsibility, it is unfortunate that he should reject the suggestion of Mahatma Gandhi that the Governor should, in the case of serious differences with Ministers, demand their resignation, as not being the solution provided by the Act, and therefore incapable of acceptance by Governors. He admits that resignation at the option of Ministers, or dismissal at the option of the Governor, is possible, but asserts that the Act does not contemplate that a Governor's option should be used to force Ministers to resign and thus to shift responsibility from himself.

The Viceroy's reading of the Act is without cogency. It is plain that, if the Governor forces Ministers to resign, he does not in the slightest degree shift responsibility from himself, but openly assumes it. He completely misunderstands the rules of responsible government, under which a Governor, who disagreed with Ministers to the extent of determining to get rid of them, would unquestionably inform them that, if they could not accept his proposals, he would reluctantly be compelled to ask for their resignation. Courtesy requires this mode of action, and to declare that it is not contemplated by the Act implies that the Act does not contemplate the adoption of the rules of responsible government as well understood in usage. It is intolerable to place a Governor in the position that he must threaten Ministers with dismissal point blank, and there

is nothing whatever in the Act to differentiate Indian from Dominion practice on this head. The rules of courtesy should be as binding in India as elsewhere in the King's Dominions, and departures from the principles of responsible government should be rigidly confined to matters clearly provided in the Act.

What the Act contemplates, of course, is that, unless disputes touch vital issues, Ministers should remain in office when the Governor states that on some matter he must decide against their advice on the ground that the Act places on him a special responsibility. The classical precedent in the Dominions is the attitude of the New Zealand Ministers in 1892[1] when the Governor refused to add twelve members to the Upper House in order to give them effective strength therein. The Governor thought that they should resign, but they remained in office on the irrefutable ground that, if it were the duty of the Governor as part of the functions imposed on him to refuse their advice, they could not be held responsible for his action and should not be justified in retiring from the administration of public affairs. Instead they made successful representations to the Colonial Secretary to overrule the Governor. The applicability of the parallel to Indian affairs is palpable and undeniable.[2]

[1] Keith, *Responsible Government in the Dominions* (ed. 1928), i. 457.

[2] Happily, Congress on July 7 decided to allow its members to accept Ministries on the strength of Lord Zetland's and Lord Linlithgow's declarations, correctly interpreted as limiting the exercise of the discretion of Governors, and Ministries were forthwith formed in all six provinces where Congress had a majority at the elections. On the plan of Congress see no. 28, *post*.

28. CONGRESS AND SELF-GOVERNMENT IN INDIA

To the Editor of THE SCOTSMAN, *12 July 1937*

1. Were it not for the stringency of its terms, due to the exaggeration inseparable from all appeals to vast popular audiences, much might be said for Pandit Jahawarlal Nehru's declaration of policy on July 10 in favour of taking office in the provinces with the twofold purpose of (*a*) pressing forward measures for the amelioration of the conditions of the people; and (*b*) preventing the coming into operation of the federal system provided by the Act of 1935.

2. The true line of progress towards self-government in India lay through the establishment of responsible government in the provinces without immediate change at the centre, as recommended by the Simon Commission. When it was shown that responsible government could be worked by Indian politicians, then the provinces could have been united in a federation, with responsible government for the centre in all matters, except defence and foreign affairs, for so long as it was necessary for Britain to ensure internal and external security. Thus India would have secured genuine democracy by the process of showing in the provinces the capacity to work that system.

3. Instead, as the result of errors on the part of Indian no less than of British politicians and of the unwise and bitter hostility shown by many supporters of Congress to Britain, a federal structure has been erected which contemplates, as a counterweight to democracy in the provinces, the creation of a permanent Conservative and even reactionary Federal Government and Parliament by calling in the aid of the autocratic rulers of the

States to nullify the votes of British subjects. The princes who contemplate accepting federation do so for one clear purpose, that of securing a voice in fiscal and other federal issues, on the one hand, and ensuring the maintenance of their autocratic rule on the other. No State should be admitted to federation unless it is willing to adopt the principle of responsible government and of democracy. If it is right, as the Act of 1935 provides, that the people of the provinces should govern themselves, under democratic Constitutions, it must equally be right that their neighbours across artificial frontiers should have equal powers; and, if the rulers will not concede them, then they should not be included in federation.

4. Many of the complications and defects of the Federal Constitution are due to this unnatural commingling of freedom and autocracy, and, if Congress would show, as it has the chance to do, its competence for responsible government in the provinces, it would have every moral right to repudiate the imposition on India of a bastard federalism planned in hostility to democracy.[1] But it is now for Congress to show its power to construct.

29. BURMA IN THE EMPIRE

1 April 1937

It has fallen to the lot of Burma[2] to add a novelty to the classification of British territories. Whereas India has from time to time parted with areas, St. Helena, the Straits Settlements, and, contemporaneously with Burma, Aden, these areas have fallen at once into the well-known class of colonies. Burma, however, has

[1] Keith, *Const. Hist. of India, 1600–1935*, pp. 473 ff.

[2] The Government of Burma Act, 1935, took full effect April 1, 1937.

been spared that status. She is a British possession so far as British Burma—that is the overwhelming mass of the territory—is concerned, with the assurance of ultimate attainment of Dominion status, and, in anticipation of this goal, she has been represented, on the same footing as Southern Rhodesia, by an observer at the Imperial Conference.

The attainment of that status rests in the hands of the Burmese, and the rate at which it will be achieved depends on their capacity for responsible government, that is, virtually on their power to compromise between the crude rights of a majority and the respect due to a minority. The failure of Parliamentary institutions in Europe can in large measure be traced to intransigence, to the determination of the majority to have their own way, and to the refusal of the minority to distinguish between legitimate opposition and defiance of the decision of the electorate. Burma is spared the extreme complications of politics introduced in India by the existence of the two great faiths, Hinduism and Muhammadanism, and the comparative homogenity of the population presents the possibility of the growth of true political parties, not based on religious or caste prejudices. Moreover, Burma is spared the drawbacks of federalism. Whatever may be said of the necessity of federalism as a means of connecting territories with certain common interests but many differences, there is no doubt that it has serious weaknesses. No single Government can ever plan for the country as a whole, and division of counsels between the centre and the provinces is a serious disadvantage. The failure of the Canadian and the Australian Constitutions to meet the modern needs of economic and financial development is unquestionable. But, if there is much to be gained

from the absence of the division of authority in federalism, there is also a certain loss. A greater responsibility rests on Burma than on any unit in India, Canada, or Australia. The errors of the policy of Alberta, serious as they are, would have been infinitely more dangerous but for the control over reckless legislation exercised by the Supreme Court under the Federal Constitution.

It is true that the powers of the Governor and of the British Government may be exercised to prevent reckless legislation or administration, but these are ineffective as compared with the limits set by a Federal Constitution, and it rests with the Burmese themselves to order wisely their legislation and finance. Happily Burma is spared the gravest of all Indian difficulties, the problem of the north-west frontier and the tribes in the unadministered area, no solution of which is yet in sight. It is possible, therefore, for Burma to spend comparatively little on her defence beyond what is necessary to maintain domestic order. Her obligations are simply those laid down by Parliament in 1862. She is expected to provide fully for the maintenance of peace and tranquillity, and to co-operate to the extent of her ability with the British Government against external aggression. The first step is unquestionably to build up from the Burmese themselves an effective local defence army. The change of status necessarily requires the conversion of the former units of the Indian army maintained in Burma into Burmese units, and they must be officered and manned by Burmese proper, as well as by Chins, Kachins, and Karens, the present project being to have five battalions of Burma Rifles, while Britain will continue to maintain in Burma two infantry battalions. Burmans also will have to undertake service in the Burma Frontier Force, which is

composed of military police, recruited in the past largely from the martial races of India. The task is a formidable one, but only by accomplishing it can Burma hope to establish her claim to Dominion status.

Naval defence must plainly rest with Britain, and the mode of Burmese co-operation remains to be determined. The fact that Ceylon, Malaya, Hong Kong, and Nigeria among others have made considerable pecuniary contributions in token of their appreciation of the security offered by the British navy, suggests the line of action which Burma may follow. Her finances have benefited considerably—the gain in the first year is estimated at 179 lakhs of rupees—from separation from India, and her debt to India, fixed at 59½ crores, to be discharged in annual payments over 45 years, is not a serious burden on a country potentially rich.

The new status of Burma necessarily involves a definite concern of the Legislature and Ministry with foreign relations, though the responsibility for that department, together with defence, remains in the hands of the Governor. Burma, therefore, in matters connected with the League of Nations or League Conferences will be provided for in matters affecting it by attaching advisers and experts representing Burma to the British delegation, while on occasion a representative of Burma may act as a delegate or substitute delegate. Final control, of course, rests as in the case of India with the British Government, but the arrangements contemplated foreshadow the final attainment of Dominion status and entry into the League of Nations as a distinct unit. In the same spirit a separate trade agreement with Japan has been provided for, and Burma will have her own trade agreement with Britain as distinct from that between Britain and India.

Democracy is now clearly on trial in Burma as in India. Its difficulties are now only too well known, but it may be hoped that the Burmese people, with their comparatively simple racial and religious conditions, will succeed in overcoming all obstacles, and in disproving the maxim that nothing but autocratic rule accords with the genius of the peoples of the east. An acid test will be afforded by the treatment accorded to the million Indians, whose labours have contributed to the growth of Burmese prosperity, and to the European and Chinese communities, whose enterprise and capital have been largely responsible for the evolution of the trade and industry of the country.

The gain to Burma from separation in point of status is shown clearly by her representation at the Imperial Conference, not merely through the presence of the Secretary of State for Burma, but by delegating the Chief Minister to attend as an observer. This device, already applied in the case of Southern Rhodesia, confers on the territory in effect all the advantages of participation in the Conference. Dr. Ma Baw took office avowedly only as a means of destroying the Constitution. His London experience may well have satisfied him how excellent a thing it is to share the protection of the British fleet and the favour of the British King; His Majesty's style of Emperor of India, of course, no longer refers to Burma.

30. INTERMARRIAGE OF EUROPEANS AND INDIANS

24 April 1937

It is axiomatic that there can be no equality between races if intermarriage is forbidden by law, and it is altogether, therefore, to be welcomed that a judicial

error, to which I called attention in 1928,[1] has been redressed by the final authority of the Inner House of the Court of Session in *MacDougall* v. *Chitnavis*.[2] In the earlier case of *Lendrum* v. *Chakravarti*[3] it was ruled that a Hindu could not contract an effective marriage even under Church rites with a Scotswoman, because the wife naturally held that she was entering into a contract which would give her the ordinary status of a wife in India, while this was not the case. The decision, in an undefended suit for a declaration of nullity of the marriage, gave many Scotswomen an ambiguous position. That is now removed by the Court of Session, which insisted on the binding effect of a marriage, whether by religious or civil form, and declined to make its effect dependent on the exact position of a wife in India, if she ever went there.

Unhappily at the same time the steadily rising tide of colour prejudice in South Africa has led to the determination of the Nationalists, with the sympathy of a large number of General Hertzog's supporters, whose Nationalist sentiments need no longer be disguised, since General Smuts has surrendered former principles for a share in power, to set a barrier between Union Europeans and Indians by forbidding the marriage of Europeans and Indians of Union domicile. This runs absolutely contrary to the clear obligation of the Union under the agreement of 1927 with India to enable Indians of Union domicile who are prepared to conform to western standards of life to do so. That accord[4]

[1] *Letters on Imperial Relations*, 1916–35, pp. 339, 340.

[2] 1937 Sc. L.T. 40. [3] 1929 Sc. L.T. 96.

[4] Keith, *Governments of the British Empire*, p. 206. Whether such marriages are eugenic or not, we simply do not know. Many of the 'poor whites' in the Union are of very degenerate stock, and the 'coloured' population in the Union has many excellent qualities.

should have led to the grant of the franchise to civilized Indians and the removal of all racial bars in their case. The new policy, while it affects but few individuals, is based merely on a colour bar, the more inexcusable because notoriously among the Dutch population many who rank as European have some infusion of native or 'coloured' blood.

It is difficult enough, in view of the ban on immigration into the Dominions, to expect India to accept association with them in the Commonwealth. To add to that the treatment of the most highly civilized Indians as unfit to marry Europeans, even of the humblest class, and as 'untouchables', falls below the standard of the meanest statesmanship.

(*g*) THE APPEAL TO THE KING IN COUNCIL

31. THE ABOLITION OF CANADIAN APPEALS TO THE PRIVY COUNCIL

10 July 1937

The symposium of legal opinion in the special number of the *Canadian Bar Review* for June reveals that a strong sentiment in favour of the abolition of the judicial appeal to the Privy Council has been created, or revived, by the ruling of that body[1] that Canada cannot, by ratifying conventions arrived at under the procedure of the Labour provisions of the Treaty of Peace of 1919, acquire legislative power to give effect to such conventions and to override provincial rights.

I naturally do not disagree with a view, which I have urged for many years,[2] that it is a derogation from Dominion status to have to go outside to find an effective tribunal, and that, if Australia can deal with the vital disputes arising between the federation and the States, Canada ought to be able to do likewise. I have further argued that, if Australia can decide such problems, it is absurd to maintain the right of appeal for issues without constitutional character. The appeal by reason of its cost, it may be added, may work grave injustice to litigants of moderate means when opposed to corporations indifferent to cost, and the expense of an appeal is always excessive.

But on the merits in law of the decisions of the Privy Council there is far more to be said than is admitted in Canada. The view that in matters not belonging to the normal sphere of Dominion action the procedure of the making of Labour conventions under the system introduced by the treaty of peace added nothing to Dominion

[1] [1937] A.C. 326.

[2] *Imperial Unity and the Dominions* (1916), pp. 374 ff.

power was that taken by the Supreme Court *In the Matter of Legislative Jurisdiction over Hours of Labour*,[1] when the issue was whether the federation could impose on the provinces the restriction of hours of Labour suggested by the Washington Conference in 1919. In one sense the Privy Council is clearly to blame for the difficulty now arising. In discussing the *Regulation and Control of Aeronautics*[2] and *Radio Communication*[3] it used language needlessly wide, and gave just reason to suppose that it was prepared to allow the federation under its residual power to regulate any matter covered by an international agreement accepted by the federation. Confronted by the concrete result of this suggestion in Canadian legislation, The Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and the Limitation of Hours of Labour Act, 1935, the Council realized how far it was being asked to go, and recoiled from the position created. No doubt it was deeply affected by an obvious result of accepting the existence of federal power. Had it done so, it would have been bound, if at any future time Canada accepted a convention abolishing the practice of solemnization of marriage by religious rites, or religious instruction in schools, to uphold legislation to give it effect, destroying a vital principle of Quebec legislation. But, apart from such a risk which might be deemed theoretical, the plain fact was that there were palpable differences between aerial navigation and radio communication and the new legislation. Ignoring treaties altogether, these are vitally matters of communication surpassing provincial limits, and in that aspect are patently federal, and it would have been undesirable in the extreme to seek to assign to the provinces distinct control of such

[1] [1925] S.C.R. 505. [2] [1932] A.C. 54. [3] [1932] A.C. 304.

aviation or radio communication as was confined to provincial limits. On the other hand, a weekly rest, hours of labour, and minimum wages are issues plainly of property and civil rights assigned by the Constitution to the provinces. That conditions should be uniform is arguable, but it is equally open to contend that in the case of a continent uniformity may be pedantry, and that each province may be left free to decide the issue for itself. What, however, is clear is that the Privy Council must have departed widely from a long train of precedent[1] to adopt the new federal claims. It must have legislated rather than interpreted the law. We see the issue in the United States, but there, as in Canada, it is permissible to prefer constitutional change by the people to alteration by the Court.

Nothing is more certain than that, if the appeal can properly be terminated, no British objection would be raised. The problem is one solely for Canada, but the fact that the British North America Act can be amended as regards the distribution of powers and the appeal only by Imperial Act places on the British Government a difficult duty. Could it amend on the request of the two Houses of the federation, which is the formal preliminary to action? Or must it look behind the requests to the wishes of the provincial Legislatures as representing the people? It is a most delicate issue, for the Fathers of Federation and the Privy Council have talked of the Constitution as a compact, which implies that it cannot properly be amended without general assent. It is no use insisting on technical arguments, which are patent but irrelevant. On two occasions only have vital and contentious changes been made in the

[1] Keith, *Journ. Comp. Leg.* vii. 61–8, and *The Dominions as Sovereign States* (1937), chap. xiii.

Constitution affecting all the provinces: in 1907, when provincial subsidies were revised, and in 1931, when the Statute of Westminster was passed, and in both cases provincial assent was finally obtained. It may be doubted if any Prime Minister for a considerable time to come would care to ask the British Government to amend the Constitution in the teeth of substantial provincial dissent. Much, of course, must depend on the nature of the issue, and the source whence objection came. But the constitutional position seems still governed by two pronouncements made in the discussion of Mr. Woodsworth's resolution of January 28, 1935: Mr. Guthrie, Minister of Justice, said: 'I think that we should have to have agreement. I do not think that the Parliament of Westminster would disregard the views of the provinces merely at the request of the Parliament of Canada.' Mr. Lapointe, now Minister in Mr. Mackenzie King's Cabinet, added: 'The Imperial Parliament could not invalidate a statute of a provincial Legislature within the sphere of its authority.'[1] With constitutional dicta of such weight it is difficult to disagree. In the meantime may we not hope that less acrimony may be manifested to the Judicial Committee, whose members have the task of interpreting a Constitution palpably much out of date, and one on which Canadian judges are far from being in accord?

It is possible that *stricto jure* concurrent action by the Federal and Provincial Legislatures might abolish the appeal, but, were accord forthcoming, Imperial legislation would be simpler, and desirable as beyond question.

[1] *J.P.E.* xvi. 288, 289. On Jan. 26, 1937, Mr. Bennett, Mr. Mackenzie King, and Mr. Lapointe all stressed the necessity of accord; ibid. xviii. 337–9.

II

FOREIGN AFFAIRS

1. BRITAIN AND ADDIS ABABA

To the Editor of THE SCOTSMAN, *5 November 1936*

It is quite impossible to accept the statement emanating from the Press Association that a Consul-General does not have to be accredited to the Government of the country he is in. It is an elementary principle of international law that consular officers cannot enter upon their duties until authorized to do so by an exequatur or other authority issuing from the country in which their duties lie. Further, it must be remembered that consular officers as such have no diplomatic status, and therefore, if the legation at Addis Ababa were reduced to a consulate, it would mean the termination of British diplomatic representation in Ethiopia. Germany, it will be remembered, as a preliminary to recognition, took the step of placing its interests in the hands of a Consul-General.

The present position for Britain is that Addis Ababa is occupied by an enemy of the Ethiopian State. In these conditions the British Minister has followed the precedent set by the neutral States in the Great War in the case of Belgium, and has remained at his post, entering into such relations with the occupying Power as are necessary for the protection of British interests. Italy could no doubt demand the withdrawal of the British Legation on the ground that her military occupation rendered its further maintenance impossible. But such withdrawal would in no degree involve any recognition of Italian sovereignty. If the Minister desires to retire, then the simplest solution would be to entrust the work of the Legation to any officer there available, who, before the occupation, had been duly

accredited to the Emperor; if no such officer is available, there is no doubt that it may be necessary to close the Legation. To accredit a new Minister to the Emperor to reside at Addis Ababa would plainly be impossible. Strictly speaking, no doubt in view of its obligations under the League Covenant, the British Government ought to accredit an envoy to reside at the head-quarters of the Emperor's Government in Ethiopia, but its determination to repudiate its obligation on this head seems definitive.

As regards consuls, the position is simple. It is generally admitted that they can continue their functions after the occupation of territory on the strength of their original recognition, without the necessity of obtaining exequaturs or other authority from the occupying Power. The difficulty, of course, is that, when it is desired to make fresh appointments, there will be no obligation on the part of Italy to permit consuls to exercise their functions, unless they receive authority from the Italian sovereign. But that may not raise trouble for the moment, and it is hardly likely that Ethiopia will offer much attraction for British activities under an Italian régime.

Recognition of the Italian conquest is, of course, prohibited by the League Covenant, and, as I have pointed out,[1] unless we are deliberately to violate that instrument, we must proceed by the process of amending the Covenant. But we cannot recognize the annexation without also recognizing Manchukuo as a sovereign State. With Germany and Italy estranged, and our position in the Mediterranean deliberately attacked,

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 218 ff. The King naturally invited the Emperor to be represented at his Coronation despite strong Italian representations.

there are cogent reasons why we should endeavour to conciliate Japan, whose treatment of Manchukuo compares quite favourably with the Italian attitude towards Ethiopia. Our commercial policy has been definitely hostile to Japan, and the interests of Australia and New Zealand alike demand that conciliation should be tried. It is not satisfactory that these Dominions should be compelled to face heavy expenditure on armaments, if diplomacy can lessen that need.

2. THE LEAGUE AND ETHIOPIA

14 June 1937

1. It is deplorable that the occasion when the League welcomed Egypt to membership should have been marked by the deliberate abstention of the Emperor of Ethiopia from sending a representative to take part in the proceedings of the Assembly. It is clear that the action taken was dictated simply by the desire to avoid a renewal of the effort countenanced by the United Kingdom[1] to invalidate the credentials of the Ethiopian envoys on the score that the Emperor is not *de facto* in possession of Ethiopian territory. The doctrine that a sovereign can lose his right to representation on the League, because one of the members of the League, in deliberate violation of its obligations under the League Covenant, and in deliberate pursuance of a policy of aggression forbidden alike by the Kellogg Pact and the Treaty of Rio de Janeiro, invades his territory, and, with the aid of bribery and of poison gas, again in defiance of a treaty obligation, defeats his forces and compels his withdrawal, is one incompatible with morality and law alike. How Britain can reconcile her attitude in

[1] Keith, *Letters on Current Imperial and International Problems*, 1935–6, p. 221 f., and no. 1, *ante*.

this matter with her categorical obligation under Article 10 of the Covenant to preserve as against external aggression the territorial integrity and political independence of Ethiopia, it is impossible to say. Her action is a flat breach of a most solemn obligation, and its imitation by other Powers proves the worthlessness of the League as an instrument for the vindication of international law.

2. A further point is raised by the decision of Clauson J. in *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*[1] that effect must be given to an Italian decree purporting to dissolve the Bank of Ethiopia issued after the capture of Addis Ababa. The judge felt himself bound by information communicated by the Secretary of State that the British Government had not recognized the Italian annexation of Ethiopia *de jure*, but that they regarded the Italian Government as the Government *de facto* of the parts of Ethiopia which they controlled. That being so, acts done by such a Government must under the principle asserted in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[2] be deemed valid in English Courts. The point does not appear to have been taken in the Court that the British Government should have been unable to recognize even *de facto* a Government which was carrying out an aggression which it was its duty to resist. Clearly the case might well have been differentiated from the ordinary case of a *de facto* Government on this basis. Under international law there is no obligation on any Power to deny effect to the actions of a *de facto* Government. On the other hand, it might surely be held that recognition of a Government as *de facto* is forbidden under Article 10 of the League Covenant.

[1] 53 T.L.R. 751.

[2] [1921] 3 K.B. 532.

3. It may, of course, well be that the Court was not in the position to take this point, once the Foreign Secretary had certified that in fact the Italian Government was recognized as a *de facto* Government. In that case we are again brought back to the fundamental fact that the British Government has refused to give any effect to Art. 10 of the League Covenant, and has disabled itself from protesting effectively against the German violation of treaties. It must essentially remain doubtful whether the utter overthrow of the treaty system of Europe is not to be traced in the long run to the action of Britain and of France in repudiating their deliberately assumed obligations under the League Covenant, and, in the case of Britain, to the Prime Minister's lack of concentration on the problems of foreign policy.

4. The uselessness of the League is further shown by its complete inactivity in the face of the ghastly massacres at Addis Ababa, during which two sons of the Ethiopian Minister to Britain shared the fate of hundreds of other equally innocent victims. No protest, of course, could be expected from Mr. Eden, but the Archbishops of Canterbury and York with others expressed detestation of such actions. The League naturally was equally impotent to investigate the massacre of non-combatants by aerial bombing by German and Italian aviators at Guernica or to afford any assistance other than pious resolutions of December 12, 1936, and May 29, 1937, condemning intervention and the bombing of open towns.

5. Even more unfortunate was the definite intimation of the Polish delegation on May 26 that it regarded as settled negatively the right of Ethiopia to be represented at the Assembly, a view at once dissented from

by the spokesman of Mexico. That Poland—herself destroyed for a century and a half by violence—should approve the like destruction of Ethiopia is singularly discreditable, but accords with the selfish and unprincipled opportunism of its absolutist régime. But that no British protest or Dominion protest was uttered is disquieting. All are still forbidden by binding obligations to accord recognition of the annexation of Ethiopia; the League Assembly declared on March 11, 1932, that 'it is incumbent on the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris'. The fact that the destruction of the Emperor of Ethiopia was deliberately planned and his subordinates bribed during a period when Signor Mussolini was asserting his peaceful intentions is proved beyond question by Marshal De Bono's *Anno XIIII*. But the Duce's bad faith had already been sufficiently shown by his action regarding volunteers for Spain. The Marshal's evidence is conclusive proof that the application of the oil sanction would have saved Ethiopia, and places a grave responsibility on Mr. Eden, Mr. Baldwin, and above all on Sir Samuel Hoare.

6. It must also be recorded that the worthlessness of Italian professions of goodwill was forthwith shown by the action taken in closing down a prosperous British Indian business in Abyssinia with contemptuous indifference to Mr. Eden's protests, and equal disregard for Britain was manifested in the exclusion of British missionaries.[1] As the latter pointed out, the effective and proper action would have been similar treatment of Italian missions in British-controlled territories, but

[1] Mr. Eden, House of Commons, June 14, 1937.

doubtless thus to act would have annoyed the Duce and run counter to Mr. Eden's ideal of peace at almost any price.[1]

3. THE KING'S DISCLAIMER OF SOVEREIGNTY OVER THE SUDAN

To the Editor of THE SCOTSMAN, *8 May 1937*

1. The success of the Montreux Conference marks a most important step in the process of attainment of Egyptian autonomy, and one the more satisfactory because it has been achieved in a perfectly legal manner, contrasting favourably with the procedure adopted by Persia in establishing her fiscal and jurisdictional freedom.

2. But of at least as much importance is a fact, the significance of which has been ignored by public opinion —the deliberate omission from the list of territories of the Crown in the Official Coronation Programme of the Sudan. The omission is the more significant because the Programme has been made the occasion for a warning to Herr Hitler that the Mandated Territories are definitively British in control by including them in the list of territories of the Crown together with the Dominions, Colonies, and Protectorates. Moreover, it is the more striking because the Sudan is peculiarly British in historical association. It was won by British strategy and in considerable measure by British forces; its long record of successful administration in the face of great difficulties is to be placed to the credit of British skill and devotion; and large sums of British capital have been invested on the faith of the British continuance of control.

3. Official explanations of the omission are lacking.

[1] *The Times*, June 17.

No technical plea is available in this case. The New Hebrides, also a condominium, has been left out by name, but it can be regarded as covered by reference to the fact that the High Commissioner for the Western Pacific is mentioned, and that it falls under his control. It is impossible to plead that the King has no sovereignty over the Sudan. He has no sovereignty in the strict sense over the mandated territories, and over Sarawak, which are mentioned, while he possesses a joint sovereignty with the Crown of Egypt in the Sudan, where, even under the new Treaty, the effective exercise of that sovereignty rests with the British Government.

4. The reasons for omission of any claim must be conjectural. But it is right to note that surrender of sovereignty was foreshadowed in the eleventh Article of the new Treaty, which provides that 'nothing in this Article prejudices the question of sovereignty over the Sudan'. This was a marked derogation from the hitherto acknowledged fact that the sovereignty was shared in full right by Britain, and an indication that the Egyptian claim to full sovereignty was no longer ruled out of court. But that the British Government would carry this to the extent of omitting the Sudan from the list of territories of the Crown, while including the mandated territories, was certainly not expected, having regard to the inevitable conclusion which must be drawn from the omission by international lawyers. It must, therefore, be presumed that the reason for the omission was political. It may have been desired to avoid any friction with Signor Mussolini, who might have declared inclusion of the Sudan in the list contrary to the *status quo* agreement of December 31, 1936.[1] But it is more probable that it is dictated by realization of

[1] See no. 17, *post*.

the fact that the establishment of Italy in Abyssinia will render the Sudan incapable of effective defence against that Power except on the basis of full co-operation by Egypt, which can be secured only by the progressive establishment of Egyptian sovereignty over the Sudan.[1] This is a perfectly defensible policy, but it is desirable that it should be definitely avowed, for it must necessarily affect the position of those who have in the past invested, or now propose to invest, money in the Sudan under the impression, hitherto fully justified, that while His Majesty shared legal sovereignty with the Crown of Egypt, there was no possibility of the surrender to Egypt of that sovereignty, and that the Sudan must be regarded as very much in the position of Berar, a territory in which another ruler possesses sovereign rights, but which His Majesty will permanently govern as part of his possessions. That supposition we now know is erroneous.

4. GERMANY'S COLONIAL CLAIMS

To the Editor of THE SPECTATOR, *5 October 1936*

The Conservative Party Conference has negatived even the discussion of the transfer under mandate to Germany of her former territories now under British control, and the Labour Party Executive refuses to consider transfer of territory to the sovereignty of dictatorships. The former body offers no consolation to Germany; the latter supports the application of the mandatory system to all colonies inhabited mainly by

[1] It is satisfactory that the menace to Britain from Italian ambitions in the Mediterranean is at last admitted in the press. Cf. Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 161, 176, 179, 220–3. The Suez Canal can be safeguarded only if Egypt is a loyal ally, and loyalty has its due price.

people of primitive culture. This project, of course, is without serious value. We have no assurance of any kind that the British subjects of Kenya and the West African colonies, or those chiefs and peoples who have accepted by agreement our protection, desire to be placed under mandate. There is no evidence that Germany would derive from their being so placed any advantage of a substantial character. What Germany claims are the solid advantages which are derived either from absolute sovereignty or from mandatory tenure. Even under the restrictions of the latter, the mandatory Power appoints and controls the executive Government, determines the legal system and supplies the Courts, establishes peace and order, develops natural resources, allocates public contracts and concessions, controls currency, weights and measures, introduces its own language, and encourages the spread of its civilization and its trade. Arguments to the effect that Germany really does not need colonies, based on trade statistics of pre-War date, are naturally regarded by Germans as absurd, and as sufficiently refuted by the obvious importance attached by people in Britain to the maintenance of the conquests made in the war.

The policy of excluding Germany from colonial expansion is a product of the war. Prior to it, successive British Governments had approved or encouraged German ambitions, and it had been recognized that Germany had a strong claim to the ultimate reversion of part of those territories which Portugal is manifestly incompetent to develop.

The new policy necessarily negatives any British co-operation in making effective the terms of Article 19 of the League Covenant by revising the terms of existing treaties. It must be taken that the vast majority of the

British people are committed to the doctrine that 'what we have, we intend to hold', and that our part in European appeasement must be confined to the bringing of pressure on other Powers to make sacrifices.

Yet at the Conservative Conference Mr. Chamberlain referred to 'the progressive decrease in our population which is even now in sight' and for which he suggested no remedy, and Sir S. Hoare alluded to the notorious fact that we cannot bring up to their meagre strength the ranks of our regular and territorial armies. In view of our population problem, are we morally justified in seeking to deny Germany the possession of oversea territories? In view of the attitude of our people towards military service, would we be prepared to go to war with Germany if she demanded from Portugal the transfer of part at least of her colonial territories?

5. GREAT BRITAIN AND ALLIANCES

To the Editor of THE SCOTSMAN, *23 October 1936*

In the discussion of Belgian neutrality, the issue of the Congo seems to have been unduly ignored. If we assume that we must defend Belgian integrity in our own vital interest, surely that does not mean that we are bound to enable Belgium to maintain her possession of the Congo. We have in point of fact committed a serious error in policy in stressing so much our obligation to maintain as a matter of our own self-preservation the security of both France and Belgium, and we should at least make it perfectly clear to Belgium that, apart from reciprocity of obligations, we assume no responsibility for her ownership of the Congo.[1]

[1] This has since been admitted. The accords for the new neutrality of Belgium (April 24, 1937) give no assurance as to the Congo.

At the present moment Mr. Churchill's policy of seeking to re-establish collective security is clearly as visionary as the allied project of the creation of an international air force to maintain that security.[1] Despite the failure of the League in regard to Manchuria, the doctrine of collective security might have been definitely established in the affair of Ethiopia, had not M. Laval deliberately violated the obligations of France to the League, and had not the Governments of Mr. MacDonald and Mr. Baldwin so gravely neglected the maintenance of British armaments that Britain had to accept the humiliation and dishonour involved in repudiating her obligations under the League Covenant. What has been done is irrevocable. To establish collective security must be left for some probably distant future.

Of the rival projects of alliances suggested to us, not one commands acceptance. To union with France and Russia the objections are patent and conclusive. But there is nothing more to be said for the suggestions of accord with France and Italy, or with Germany and Italy. Those who advocate close relations with Italy must be singularly ignorant of the consistent faithlessness of that Power to treaties. Her wholly inexcusable attack on Turkey in 1911 was followed by her betrayal of her allies in 1914–15, and her deplorable onslaught at Corfu, which the League failed to punish, led to her successful violation of the League Covenant, the Kel-

[1] Mr. Churchill is now President of the British Section of The New Commonwealth, whose object is the establishment of an Equity Tribunal and a Police Force to secure international justice. Its project is impracticable, but its sponsors show intellectual clarity as compared with the combination of imperialists and pacifists (Lords Hardinge, Rennell, Arnold, Lothian, George Lansbury) to urge an impotent and discredited League to undertake the removal of the causes of war; see Lord Davies, *The New Commonwealth*, 1937, pp. 116–18.

logg Pact, the Treaty of Rio de Janeiro, and the Geneva protocol against the use of poison gas. The Duce's determination to restore the glories of the Roman Empire is incompatible with the maintenance of Britain's position in the Mediterranean.

The attitude of our youth to army service affords another reason to negative any alliance, for we cannot promise aid which we cannot be sure we can give. The one positive contribution we can now make to appeasement in Europe, the avowed aim of our Government, must lie in diminishing the barriers we have raised against freer trade, and it remains to be seen if we are willing to make even this minor gesture in the interests of peace. Communism and Fascism alike are largely products of unsound social and economic conditions.

6. BRITISH FOREIGN POLICY

To the Editor of THE SCOTSMAN, *19 November 1936*

1. Mr. Eden relies too much on the shortness of the public memory when he asserts that Germany is the only country which has repudiated its obligations under the Treaty of Versailles. He is perfectly well aware that the first vital breach in the Treaty was M. Laval's secret agreement with Italy to acquiesce in her plans against Ethiopia, which undermined the foundations of the League of Nations. He is equally aware that the British Naval Agreement with Germany of 1935 was a definite violation of the Treaty of Versailles; that Britain and all the other members of the League deliberately violated their obligations under Article 16 of the League Covenant; and that the British Government, on his own advice, completed the betrayal of Ethiopia by abandoning the feeble sanctions undertaken. There

has been wholesale and deliberate violation of the most solemn treaty engagements, and Britain is deeply implicated, though France must bear the chief blame for the destruction of the substance of the League of Nations.

2. It is absurd, of course, to say that the recognition of General Franco's Government by Germany and Italy is a breach of Article 10 of the League Covenant, for that recognition does not purport to affect either the territorial integrity or the political independence of Spain, whatever the ultimate outcome may be. But the course of events shows how utterly unwise was M. Blum's policy of non-intervention, which was so devised as to secure that the Spanish Government should be left without armaments while the rebels were supplied generously by Germany and Italy, and how foolish was British acquiescence, once it became obvious that this was the outcome of the project. The danger of the situation is very great. The recognition accords no right to General Franco to search any save German and Italian ships. If he stops Russian, French, or British ships, are these Governments to acquiesce? Until these Governments recognize the rebels as belligerents, interference with their ships is absolutely illegal, and under former Governments would have been forbidden by naval action. Are we to follow the Ethiopian precedent and surrender at discretion to Italy? If so, it may console us for the loss of Gibraltar as a naval base that General Franco has promised to redeem his massacres of women, children, and civilians, and the outrages committed by his Moorish mercenaries, by a concordat with the Roman Catholic Church.

3. No doubt those who have so effectively, by denouncing any attempt to come to terms with Germany

at the price of the transfer of the mandated territories, blocked the way to an accord with that Power, have noted with satisfaction the inevitable outcome, the understanding reached between Germany and Japan. Their attitude, of course, has played directly into the hands of Herr Hitler by enabling him to devote himself to his ideal of the overthrow of Russia and the weakening of France, confident that when he has done so he can renew with unanswerable force his demand for concessions. Japan cannot be blamed for her decision to make common cause with Germany. She has been irritated both by the deliberate attack on her trade with the colonies, and by the hostility of Australian tariff policy. It is indeed very dubious whether the policy of breaking off the Japanese alliance at the desire of Canada has not proved a serious blunder.

4. Most disquieting of all, however, is Mr. Baldwin's emphatic endorsement yesterday of his speech of November 12. We now know that in his view it is not his duty to risk popularity and loss of power by frankly warning the country of the dangers threatening it. It seems to me the most amazing and indefensible of doctrines, when it is remembered how infinitely much better off is the Government than the public in regard to information as to the strength of foreign countries and the weakness of our own. Is it surprising that our youth decline by joining the military forces to place their lives under the control of a Ministry which shares Mr. Baldwin's views, and prefer either remunerative work on rearmament or unemployment allowances? Does any one understand the foreign policy of the Government?

7. STRENGTHENING THE LEAGUE: DANGER TO THE COHESION OF THE EMPIRE

To the Editor of THE SCOTSMAN, *1 January 1937*

Great as is the respect due to the signatories of the manifesto in favour of strengthening the League of Nations to enforce collective security, it can hardly be denied that for some considerable time at least there is no possibility of pursuing successfully the policy they recommend.

1. The signatories overlook the cardinal fact that the débâcle of the League in 1935–6 was due to the attitude of the Governments of the United Kingdom and of France, homologated by the great mass of British and French opinion. The obligations of Articles 10 and 16 of the Covenant were categorical, and France had defeated deliberately the efforts, to which the United Kingdom was a party, to weaken the categorical character of the requirements of Article 16, on the score that they were essential in the interests of her security. Yet both the Powers from the first declined to contemplate any serious action under Article 16, did nothing to fulfil the wider obligation under Article 10, and Britain led the way in withdrawing even the mild sanctions imposed. The violation of the Covenant by the two leading democratic States justified, no doubt, in Herr Hitler's eyes his repudiation of the Treaty of Versailles; and, however reluctant we may be to admit it, struck a fatal blow at the authority of international law and the sanctity of treaties. Let us suppose—what is impossible—that a majority of Powers could be found ready to strengthen the terms of the Covenant; what value would the new obligations have? Any Power, which did not wish in any particular

instance to give them effect, could appeal conclusively to the action of Britain and France in acquiescing in the most deliberate aggression against a member of the League, and in hastening to make advances to the aggressor to induce him to overlook even their minor efforts at imposing sanctions. Britain had a unique opportunity of asserting the value of treaty obligations. She deliberately threw it away, and it is idle to suppose that this error can be repaired for many years to come.

2. To attempt to increase British obligations to take military measures against aggression would place a fatal strain on the frail cohesion of the British Commonwealth. With the exception of New Zealand, not a Dominion would be willing to assume any fresh obligation. In Canada the spirit of isolation has manifestly grown stronger and stronger since the fiasco over Ethiopia. The French Canadians and the other very large non-British elements of the population accept whole-heartedly the United States' hostility to any engagements which suggest the possibility of Canadian participation in any war, and the demand for assertion of the right of neutrality is being raised. In Australia, sanctions against Italy were bitterly opposed, and the Labour Party has declined to accept as sound the Ministry's anxiety for co-operation with the British Fleet, preferring concentration on local defence only. The only form of co-operation in regard to which Australia is united is that of Britain in safeguarding the maintenance of the 'White Australia' policy. The Union of South Africa's gallant defence of sanctions was marred in practice by the insurance against loss of Italian goodwill in the form of paying, despite sanctions, the steamship subsidy so much resented by British

traders.[1] The Union claims the right of neutrality, and will accept no automatic obligation of any kind to go to war. Needless to say, the Irish Free State is in like condition. Nor can we justly pledge India to action refused by the Dominions.

Nothing, I suggest, should be done to add to the difficulties of holding together the Commonwealth. The pursuit of the ideal of automatic sanctions, including military action, can effect nothing of value in European affairs, but it may easily play into the hands of those who desire to see the progressive weakening of the cohesion of the British Commonwealth of Nations.

8. HERR HITLER AND THE RETURN OF THE GERMAN COLONIES

To the Editor of THE SCOTSMAN, *5 February 1937*

It might be sufficient in reply to the critics of my views on the possible return of the German Colonies to refer to the refusal, despite enormous pressure, of the British Government to negative that possibility, as proof that those who have the fullest knowledge of the dangers of the present situation in Europe recognize that it would be a fatal error to proclaim that Britain insists on maintaining at any cost the spoils of war. But it may be well to remove some patent errors.

1. That the system of mandates does not constitute annexation nor convert the people of the territories into nationals of the mandatory is the unanimous view of the Council of the League of Nations, of the Permanent Mandates Commission, of every mandatory Power, of

[1] £150,000 a year for 5 years from 1933. General Hertzog's defence of his action (March 18, 1936) was hopelessly weak. On April 14, 1937 Mr. Fourie, with Nationalist applause, disclaimed any interest in British shipping!

the British Courts, and of every international and constitutional jurist of high standing. Is it not idle to set any individual opinion against such weight of testimony?

2. There is not a word about permanency in the mandates, and the essence of the mandatory system negatived any such assertion. It ought to be known to every one that the system was insisted upon by President Wilson in lieu of the annexation desired in the case of the territories claimed by the Dominions, and that he would never have agreed to stultify himself by making the mandates permanent.

3. As regards consultation of the wishes of the people, it is impossible for Britain to ignore the fact that she declined to give effect in the case of Palestine to the one specific requirement of the League Covenant, Article 22, on this head. It is also useless to pretend that the wishes of the inhabitants, e.g. of Tanganyika, could be effectively ascertained in a manner which would have any value in any eyes save our own. When it suited us to hand over Jubaland to Italy, we made not the slightest attempt to consult the people affected, and we cannot with any pretence to honour assert that we must do so now.

4. The most absurd contention is that we are bound to refuse concession, because to yield would annoy General Smuts. As Mr. Duncan has properly reminded us, General Smuts and General Hertzog have secured the creation of the Union as a separate kingdom, which has no obligation to accept participation in British wars, and on January 22 General Hertzog categorically denied that the agreement of 1921 regarding the Cape Peninsula land defences had been renewed or reaffirmed by Mr. Pirow on his London mission. The Union could

give no aid to Britain against a German attack, and Britain must conduct her foreign policy with regard to the lives and property of her own people. Does any one seriously suggest that Britain would have a right to protest if the Union gave back South-West Africa with the approval of the League Council? The Dominions are fully autonomous, but the same autonomy must not be denied to Britain.

5. The denunciations of Germany are so reckless as to lead us nowhere. It is utterly unfair to ignore the fact that the breaking of treaties by Germany concerned treaties imposed by force of arms, and followed upon the complete failure of France, at any rate, to carry out disarmament. Further, the most serious step of all, that of March 1936, followed upon, and was doubtless in large measure prompted by, the utter failure of France and Britain to keep their voluntarily undertaken obligations to Ethiopia, and their thinly veiled condonation of the decision of Italy to annex that country. It should have been obvious that, if Italy were allowed to violate treaties wholesale and to acquire an African Empire, Germany would be driven to demand back her colonies. To break faith yourself and denounce others for like action seems to me immoral.

6. Your correspondents will not face the fact that our claim to the territories rests on victory in war, and that no great people such as is the German will forget the fact or fail, when any opportunity arises, to demand them back. Germany has made in this connexion no despotic demands, and has definitely declared that she desires colonies for economic ends only. There is, therefore, room for negotiation on that basis, and it seems to me absurd to declare in advance that Germany will not accept terms. The policy which I have always

advocated is that Britain should be prepared to consider return of the colonies, subject to conditions of demilitarization and provisions for the interests of the natives, if Germany in return is willing to take steps for European appeasement (e.g. cessation of her Spanish intervention) and reduction of armaments. If and when Germany rejects such a line of policy after an honest offer, then we must make up our minds to the vanishing of hope that peace may yet be secured definitely. At present, of course, we are giving Germany an ideal opportunity of believing us to be actuated solely by Imperialistic greed.

9. THE IMPERIAL CONFERENCE AND FOREIGN POLICY

To the Editor of THE SCOTSMAN, *9 March 1937*

I wonder if Mr. Eden takes very seriously his suggestion that, at the Imperial Conference, agreement will be reached on lines of action which will contribute towards the peace of the world. He must know the essential conditions so fully that he cannot be surprised if the net result of the Conference is, as in 1926 and 1930, wholly negative. This follows from the essential factors of the situation.

1. In Canada the doctrine of complete neutrality in a British war has been negatived decisively in favour of the established doctrine that Canada shall not be bound by any arrangement to automatic participation in hostilities. The issue must be decided on each occasion—unless, of course, Canada is actually attacked—by Parliament, convened if necessary for that end. Mr. Mackenzie King is a convinced adherent of this policy, but it is inevitable in any case, and it precludes any

engagements by Canada which would involve her in obligation to go to war.

2. In Australia the situation is virtually the same, with the qualification that Australia expects that British policy shall be based on the doctrine that the essential danger to be provided against is attack on Australia from Japan. It is recognized in the Commonwealth that the termination of the Japanese alliance to gratify Canada and the United States has inevitably worsened the position in the Pacific by presenting Japan with a grievance against the British Empire as animated by racial prejudice, and that the failure of her people fully to occupy the country tempts Powers with increasing population. There is no party in the Commonwealth ready to undertake obligations involving risk of war, and the failure of the referenda proposals of the present Government and the absence of Labour representation at the Conference render it utterly impossible for Australia to adopt any but a negative attitude.

3. The Union of South Africa has made it absolutely plain that it will accept no obligations, and that it will remain neutral, and, if necessary, secede from the Commonwealth, if it does not like any particular policy or its outcome.

4. Positive co-operation from the Irish Free State will clearly be refused so long as partition remains, and it may be hoped that no member of the Government is prepared to betray the people of Northern Ireland.

5. New Zealand alone can be expected to favour identification of her interests with those of Britain, and India can be made to accept British policy. But the plain fact is that Britain can work in full accord with the Dominions only by adopting a policy of isolation from the affairs of Europe. Even in 1925 not a single

Dominion would accept the Locarno Pact, and it may be assumed that there is equally no chance of their accepting a new Western Pact. We have just witnessed the refusal of every Dominion save Australia to be concerned with the Montreux Convention of 1936 regarding the Straits, lest even remotely they should be bound to intervene in European issues. Nor would Australia have been represented had her Government been Labour.

6. But the isolation demanded by the Dominions is impossible for Britain, and would compel the denunciation of our accord with France, which would involve us in too great danger to be faced. We must, therefore, resign ourselves, as in 1926, to a recognition of the impossibility of an Imperial policy in the sense of a policy in which all share equally. Britain must have a regional policy, for she cannot ignore Europe.

7. Clear recognition of the facts is essential in their relation to the proposed transfer of mandated territories. It is a perfectly intelligible policy to treat the British conquests from Germany as too valuable to be surrendered, and to be worth maintaining even at the cost of perpetuating European strife. But it is ridiculous to state that Britain must adapt her action regarding Tanganyika to the wishes of the Union of South Africa, whose Prime Minister, having established the divisibility of the Crown and the rights of neutrality and secession at pleasure without notice, is coming to the Conference to urge the abolition of the conception of British nationality in the Union, so that we may be, as in the Irish Free State, aliens in the Union. British foreign policy used to be subservient to the interests of Hanover; it is not necessary that it should sacrifice the interests of the people of Britain to those of the

predominantly Dutch Union. The Union enjoys rightly full independence; she must concede it to Britain. Recognition of autonomy in all units precludes a common foreign policy, and frank admission of the fact is better than concealment.

8. It is a melancholy consideration that our repudiation of our obligations under the League Covenant, and the consequent destruction of the value of the League, should have destroyed also the one element of unity in the foreign policy of the Empire, common obligation to carry out the terms of the Covenant.

10. THE NEGATIVE OUTCOME OF THE IMPERIAL CONFERENCE

To the Editor of THE SCOTSMAN, *18 June 1937*

1. That Canadian opinion should approve the outcome of the Imperial Conference is as natural as the keen disappointment of New Zealand that Mr. Savage should have been forced to return without the decisive results which at the opening of the Conference he begged for. The Australian and New Zealand pleas for plans of co-operation in defence, in which Canada and the Union should share, were rendered hopeless from the first by Mr. Mackenzie King's fundamental principle that the function of the Imperial Conference is not to formulate or declare policy, and by General Hertzog's significant gesture in leaving his Minister of Defence at home, with authority to declare on May 8, on the eve of the Conference, that the Union was assured that Britain would never ask her to do more than provide for local defence. Why Mr. Lyons and Mr. Savage were blind to these facts, it is hard to tell. The negative attitude of both Dominions rests not on

caprice, but on fundamental considerations of local political feeling, of which the Conference had a dramatic reminder in the repudiation, during its proceedings, of allegiance to Mr. Mackenzie King by the Premier of Ontario and his appeal to Mr. Duplessis, the leader of the movement which destroyed the Liberal Government of Quebec, to stand out as a dominant factor in Canadian politics.

2. The foreign policy[1] enunciated by the Conference is in complete accord with Canadian views. Mr. Mackenzie King emphatically denied the rumours that efforts had been made by British Ministers to place him at the head of a movement to eliminate sanctions from the Covenant. But all that Canada wished is given by the essential principle, which, in fact, was formulated, that the settlement of differences between nations and the adjustment of national needs should be sought by methods of co-operation, joint inquiry, and conciliation, and not by recourse to force. In the same sense the Conference, though attached to democracy and Parliamentary government, opposed firmly the idea of a division of Powers into groups divided by systems of government. It did not, therefore, lend the slightest support to the idea of strengthening the League as an active power to maintain respect for international law, and the Ethiopian and Spanish issues are passed over in silence. The British pledges to France receive mild approval, but naturally no Dominion adhesion, and an equally mild welcome is afforded to Mr. Lyons's dream

[1] So devastating was the impression of Canadian aloofness that at Paris on July 2 Mr. Mackenzie King said: 'Some people have been imagining since the Imperial Conference that Canada wished to withdraw more from the affairs of the Commonwealth. That is entirely untrue. We like to manage our own affairs, but any threat to Britain would immediately bring Canada to her side.'

of a Pacific regional understanding and pact of non-aggression.[1] Even on the removal of economic barriers and other obstacles to the increase of international trade, and the improvement of the general standard of living, the Conference was so guarded that it is optimistic of Mr. Chamberlain to claim that it has shown 'that a selfish and exclusive economic nationalism forms no part of our common creed'. The truth is that Canada, in the interest of her relations with the United States, with which she has already concluded a treaty, is willing to consider further adjustments, but that the rest of the Dominions are wholly unenthusiastic.

3. The vital question, of course, presents itself. How far will the members of the Commonwealth go in the way of co-operation, joint inquiry, and conciliation, to meet the needs of other nations? Put plainly, will they make any territorial sacrifice for the sake of securing appeasement in Europe, or are their admirable sentiments based on the fundamental doctrine, so frankly voiced by Mr. Pirow, that the price for appeasement of Germany must be paid, but by some country other than Britain or the Union? It is easy and natural for the Commonwealth, which made enormous territorial gains by the Great War, to preach peace; it is intelligible that it should acquiesce without apparent discomfort in the attainment by Italy of part of her national needs at the expense of Ethiopia, even though serious risk to communications with the East is thereby

[1] Mr. Lyons, conscious of the growing power of Labour and its dubious attitude to his great scheme of defence expenditure, aimed at a striking gesture. As it was observed on June 19, in Japan the difficulties in the way of a pact were almost insuperable. It would involve the British and United States Governments in acceptance of the independence of Manchukuo, and Chinese acquiescence therein and in a part at least of the Japanese claims on North China.

involved, and in her efforts to consolidate her position in the Mediterranean by open aggression against Spain. But is the Commonwealth really justified in its belief that the exclusion of Germany from oversea territories is consonant with either justice or expediency?

11. THE POWERS AND SPAIN: THE LAW OF BELLIGERENCY

To the Editor of THE SCOTSMAN, *10 August 1936*

As there is clearly confusion in regard to the position under international law of the contending parties in Spain, it may be worth while pointing out that recognition of the rebels as belligerents would not carry with it any obligation to receive diplomatic agents from them. There are two completely different kinds of recognition: recognition as a belligerent Power, and recognition as a State. The former kind of recognition is permissible, without breach of international law, and without manifestation of hostility to the legal Government, when a rebellion is being carried on by forces which have organized a Government, and are in effective possession of a substantial area of the national territory, and which conduct their hostilities with due regard to the rules of warfare. When a conflict is being carried on by sea, recognition of belligerency may become necessary in the interests of neutral States, which will then apply the laws of neutrality. The classical example, of course, is the British recognition of the Confederate States as belligerents by the issue on May 14, 1861, of a proclamation of neutrality, after it had been found that the United States Government itself had declared a blockade of the coast of the revolting States, thereby exercising a right which implied their being belligerents.

Mere recognition of belligerency does not justify any exchange of diplomatic agents or the making of treaties, but permits quasi-diplomatic relations, confined to the needs of the nationals and property of the State according recognition. Consuls may continue their activity on the territory held by the belligerent, but exequaturs cannot be sought or granted.

The British Government, of course, is entirely at liberty to decide whether it would be advantageous to recognize the belligerency of the rebels, and to issue a proclamation of neutrality; but prima facie this step should be taken only if British interests essentially demand action. A legitimate Government attacked by a military clique using native troops normally can claim British sympathy, and, legitimate as was British action in 1861, it embittered Anglo-American relations for half a century. It is to be hoped, therefore, that any drastic measures may be avoided. As it is, the attitude of complete impartiality between a Government *de jure* and rebels, which we have adopted, is justifiable only if it secures like action on the part of Powers, like Germany and Italy, which sympathize with the rebels.

12. INTERNATIONAL LAW AND THE SPANISH SITUATION

To the Editor of THE SCOTSMAN, *22 August 1936*

1. If Berlin admits that Spain notified that Cadiz was a war area before the stopping and search of the *Kamerun*, then Germany seems to have no case in principle for protest, and certainly none for the mode of her action, which seems prima facie to be intended to encourage the rebels. The Spanish notification would have no meaning except as an intimation of blockade.

International law is too clear for Spain to misunderstand its requirements.[1]

2. It hardly seems that the Spanish Government need have any objection to recognizing the rebels as belligerents, if by doing so it can strengthen itself against foreign intervention, and hasten the termination of the struggle. By doing so it does not in the slightest compel itself to recognize within Spain any acts done by the rebels as belligerents; on the termination of belligerency it can disown all their acts if it thinks fit; and nullify all sales of property made, and levy again any taxes collected, without violating any established rules of international law. If movable property of the Government is sold by the rebels out of Spain, and can be identified as in the possession of any person in this country, there is high authority for the view that it can be reclaimed by the legitimate Government. British subjects, therefore, will be well advised if they eschew any such purchases.

3. It is not a necessary result of Spanish recognition of the belligerency of the rebels that Britain should also recognize them, and issue a proclamation of neutrality. Britain could clearly do so; but the question is simply one of British interests, as it was in 1874, and in respect of the Confederate States in 1861. If the war is to be prolonged, as the Spanish Government is believed to have admitted, then a proclamation of neutrality would be in order, and would solve many legal difficulties.

4. It is important to note the condition on which Italy is ready to prevent her subjects from providing the rebels with arms and aeroplanes. They include a

[1] The Spanish Government seems to have repented of the idea of recognizing the rebels as belligerents, in which case, of course, it had no right to assume powers based on that state.

genuine neutral duty, the prohibition of the enlistment of volunteers, but also the prohibition of public subscriptions for the assistance of the Spanish Government. Italy no doubt aims at the action of the British Labour movement in collecting money for the assistance of the wounded among the Governmental forces and for the provision of food, in case of shortage induced by rebel action and the taking away of the workers from their normal avocations. Now, even if Britain declared her neutrality, she would be under no obligation to prohibit such charitable collections. There exists no legal power to do so, and if Britain decides that it is worth while submitting to the quite improper efforts of Italy to aid the rebels, it will be necessary to secure power from Parliament so to act. It is true that by a very grave stretching of the powers given by the Treaty of Peace Act, 1919, sanctions against Italy were applied by Order in Council.[1] But it was a very dangerous precedent from the standpoint of liberty, and it may safely be assumed that any effort further to strain the law would be resisted in the Courts. If the policy of the Government is wise, it can have no possible objection to explaining it to, and obtaining the necessary approval from, the Houses of Parliament.

13. BRITISH SHIPS AND THE CARRIAGE OF ARMS FOR SPAIN

To the Editor of THE SCOTSMAN, *24 November 1936*

1. I confess I do not understand the suggestion that it is the general aim of the Bill to be introduced into Parliament 'to make sure that British ships are well

[1] See Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 31, 32, 147.

inside their rights before the British Navy takes any special steps to defend them against molestation on the high seas'.

2. There can be no question whatever at the present moment, under either international or municipal law, of the absolute right of British ships to convey munitions from foreign ports to ports under the control of the present Spanish Government, recognized *de jure* by the King, and it is a complete innovation for Britain to prohibit such action, from which in times past British firms have drawn much profit. That Britain should pass such legislation unconditionally, without even securing the concurrent action of France, seems very strange. One would have thought that common sense would dictate that the operation of the measure should be suspended until His Majesty is satisfied that like measures will be taken by the other parties to the Non-Intervention Agreement. The British attitude is painfully reminiscent of the steps taken by Britain and France to prevent Ethiopia obtaining armaments, despite their obligations under Article 10 of the League Covenant, of which the Emperor has issued a timely reminder in protesting against the inexcusable recognition by Austria and Hungary of the Italian conquest.

3. Worst of all is the deliberate refusal of Mr. Eden to promise protection for British ships within Spanish territorial waters. Yet his advisers must be perfectly well aware that British ships have an absolute right of free access to Spanish ports declared open to them by the Spanish Government, and that they are entitled to be protected in exercising this right by Britain against the attacks of pirates, as in law the rebels are, so long as they are not recognized as belligerents. The least we could expect from Mr. Eden is a categorical assertion

that the British Government cannot permit armed attack on any British ship proceeding to a Spanish port not closed to traffic by order of the Spanish Government. There is no real reason to submit humbly to the threats of insurgents when the British Fleet is still in being, and nothing will encourage Fascist intransigence more than patent cowardice.

4. I hope also that Mr. Eden will be asked[1] to explain why he is prepared to legislate against British ships, while he regards with indifference, if not approval, the departure of General O'Duffy and members of his Irish Brigade from Liverpool to Lisbon *en route* to aid the Moroccan native forces in the holy crusade to return Spain to the domination of the Roman Catholic Church. The General's intentions have been openly avowed, and are unquestioned. Surely Mr. Eden might be asked categorically to say whether he was advised that the Foreign Enlistment Act, 1870, is insufficient to prevent the departure from our ports of men pledged to destroy the Government recognized by the King, and, if so, whether he is prepared to extend his new Bill to put a stop to the recruiting of forces for action against the Spanish Government or their departure from English or Scottish ports. If he refuses to do so, it will be difficult to believe in the sincerity of British neutrality.

14. THE BRITISH NAVY AND THE PROTECTION OF DOMINION SHIPS

To the Editor of THE SCOTSMAN, *2 December 1936*

1. No more deplorable utterance as regards relations with the Dominions can well be imagined than the

[1] All but two months elapsed before any M.P. ventured to raise the question; see no. 16, *post*. It is rather an interesting illustration of Parliamentary indifference to any not immediately party issue.

assertion of Mr. Runciman that the British Navy would not afford protection to Dominion vessels if piratically attacked on the high seas by the Spanish insurgents. This is the first time on record that a British Minister has qualified the absolute right of every British ship in the widest sense to the protection of the British Navy, and it is the first practical application of the doctrine of the separation of the Commonwealth into distinct sovereignties. The dissolution of the Commonwealth may be inevitable, but it should not be hastened by British Ministers.

2. The position, of course, is that the British Government has deliberately decided to adopt a certain line of policy without obtaining Dominion concurrence, a policy, moreover, which admittedly goes further than that of any other party to the Non-Intervention Agreement. The Dominions, save the Irish Free State, are not parties to this agreement, and the use of Dominion shipping to carry munitions from any foreign port to ports controlled by the Spanish Government is absolutely legal and wholly proper, unless and until it is disapproved by their Governments. Interference with such shipping is piracy under international law, and the clear duty of Mr. Runciman was to declare in reply to Mr. Shinwell that the duty of the British Navy to protect vessels of the British Commonwealth from pirates continued to be recognized by His Majesty's Government. Nothing could be more destructive of the Commonwealth than the spectacle of rebel cruisers stopping Dominion vessels off the Spanish coast, while the British Navy contemplated their action with indifference.[1]

[1] Labour pressure and protests in governmental circles secured Mr. Eden's assurance that British naval protection would not be withheld. But

3. It should be added that, if the British Government recognizes the rebels as belligerents, this recognition will not under the constitution of the Commonwealth involve such recognition by the other parts of the Commonwealth, and a most serious position would arise. If, therefore, recognition is intended—and it is a matter to be decided solely on grounds of the best interests of Britain—every effort should be made to secure Dominion concurrence. There is, only too obvious at the present day, failure to co-ordinate British and Dominion policy, as was painfully seen in the diametrically opposite views taken by the Union of South Africa and New Zealand and by the United Kingdom in the matter of the withdrawal of sanctions.

4. As the British Government has done nothing to prevent the departure from England of recruits for the rebel forces, though it has the power to do so, it is hardly surprising that Germany should have equally encouraged such action. But there is the difference that a Fascist victory in Spain will be as valuable to Germany as it will be disadvantageous to us.

15. VOLUNTEERS FOR SPAIN

To the Editor of THE SCOTSMAN, *19 December 1936*

1. Nothing is more curious than the delay which has taken place in any action by the Government to enforce the provisions of the Foreign Enlistment Act, 1870, against the British subjects who are proceeding to Spain to swell the forces of the insurgents. You were so good as to publish, in your issues of November 25 and December 3, letters[1] in which I called attention to the

the pledge was palpably based on the fact that there were no Dominion ships concerned.

[1] See nos. 13 and 14, *ante*.

reports of the movements of members of General O'Duffy's Irish Brigade; but despite the widespread knowledge of these movements the Attorney-General is seemingly still merely considering the matter. The facts are widely disseminated in the Free State. He will find in the issue of the *Irish Independent* for December 12 the fullest particulars of a hundred more volunteers who left Dublin on December 11 for Liverpool *en route* for Spain to join the Irish Brigade. Particulars of the names, addresses, and careers of the men are given. The numbers are rapidly growing. Yet the Government which took the trouble to procure legislation to prevent British ships carrying munitions from foreign territory to Spain has acquiesced in this deliberate reinforcement through Liverpool of the rebel army.

2. The inactivity of the Government is the more curious because Mr. Eden has always been assuring us of his sincerity in the doctrine of non-intervention; but possibly this sincerity has suffered qualification from desire to avoid interference with the attitude of General O'Duffy and his supporters. But the fact that the Irish Free State Government does not enforce the Act of 1870 is easily explained by the religion of the people of the State, and affords no justification for the deliberate omission of the British Government to prevent the use of British ports for purposes hostile to a friendly Government.

3. Even more surprising is the suggestion of Mr. Attlee that the Foreign Enlistment Act cannot apply to affairs in Spain unless recognition is given to General Franco. A little reflection would have shown the Leader of the Opposition that the Act would have lost much of its value if this were the effect. A little investigation

would have shown him that the legislation of 1819 was expressly worded to cover the case of a rebellion against a friendly Power, irrespective of the question whether the rebels were or were not recognized by the Crown, as belligerents. Slightly more research would have revealed to him the existence of conclusive authority to refute his belief. The decision of the Privy Council, delivered by Lord Cairns in *Reg.* v. *Carlin* (6 Moo. P.C. N.S. 509) disposes finally of the matter. The rebels there were insurgents in Cuba, who, as Mr. Attlee must know, were never accorded belligerent rights by the British Crown, and no one seems in that case to have been rash enough to attempt to argue that the fact that they were not belligerents made any difference. The Attorney-General, I am glad to note, gave no sanction to Mr. Attlee's most unfortunate error.

4. It may be added that in that case the Governor of the Bahamas was at pains, when he learned of the insurrection, to issue a proclamation on March 24, 1869, warning British subjects of the terms of the Act of 1819. In view of the widespread ignorance here prevalent it might seem wise for the Government to issue a warning of the same character.[1] If we are to follow the principle of non-intervention, let it be complete and fair. Do not let us pass fresh legislation, which results in hampering the legitimate Government recognized by the Crown, and refuse to put in force existing legislation in order to facilitate the reinforcement by British subjects of the insurgents. Surely it is not merely illegal, but immoral, for British ships to transport forces for the rebels.

[1] See no. 16, *post.*

16. THE FOREIGN ENLISTMENT ACT: ITS TARDY ENFORCEMENT

To the Editor of THE SCOTSMAN, *11 January 1937*

1. It is satisfactory that the Foreign Office has, however tardily, taken the obvious course, which I suggested in your issue of December 21,[1] and has warned British subjects of the terms of the Foreign Enlistment Act, 1870. It is, however, curious that action should follow on the departure of some 25 supporters of the Spanish Government, while for many weeks members of General O'Duffy's Irish Brigade have sailed from British ports openly to aid the insurgents. One can only suppose that the delay has been due to failure to realize until now the true legal position, which, it may be admitted, is a little obscure.

2. The obscurity is due to the fact that the Act of 1870 is, as its title intimates, intended 'to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace'. It is essentially an Act to enable the Crown to carry out its neutral duties between belligerent States. But as early as 1819 the definition of 'foreign State' was so framed as to cover insurgents, without requiring that they should be recognized by the Crown as belligerents, and in the case of *Reg.* v. *Carlin* (6 Moo. P.C.N.S. 509) the Privy Council applied the Act to Cuban rebels against Spain.

3. When, therefore, ss. 4 and 5 of the Act penalize acceptance of 'any commission or engagement in the

[1] See no. 15, *ante*. On Jan. 21 Mr. Mander elicited a statement from Sir John Simon to the effect that his failure to prevent the use of British ports by General O'Duffy's brigade was due to lack of evidence in time to act. This is so lame an excuse that Mr. Noel-Baker may be excused his belief that the Law Officers did not at first appreciate the application of the Act of 1870.

military or naval service of any foreign State at war with any foreign State at peace with Her Majesty', the definition of 'foreign State' operates, on the one hand, to prohibit service with the insurgents, but also to prohibit service with the Government of Spain. The fact that the result is prima facie unexpected explains, no doubt, the reluctance to accept the interpretation now officially adopted by the Foreign Office. But the wording of the Act is conclusive. It must, however, be noted that there is no implication whatever of recognition of the insurgents as belligerents, or of an official British neutrality towards two belligerents.

4. It is unfortunate that the Foreign Office has not included in its notification a specific reference to s. 7 of the Act, which penalizes the taking or having on board any ship within the British Dominions of any persons illegally enlisted under ss. 4 and 5, and authorizes the detention of any such ship. This is, of course, a vital provision, and it is clearly incumbent on the Foreign Office to make it effective against the use of any ships sailing from British ports with members of the Irish Brigade. It is really intolerable that a special Act should have been passed to prevent British ships carrying munitions from foreign ports to Spain while flagrant disregard of an existing law by British ships was being ignored by British authorities.

5. Further, as the Act of 1870 is part of the law of the Irish Free State, and as the Free State is party to the Non-Intervention Agreement, has Mr. de Valera been asked to put the Act in operation? Surely it is absurd that Germany and Italy or Russia should be attacked for sending volunteers when the Free State is an offender. The Irish Volunteers go openly and undisguised, and no one will suggest that they do so without

the authority, as opposed to the encouragement, of the Free State authorities. Curiously enough, except in the Irish Press the existence of the Irish Brigade seems largely ignored.[1]

17. THE ANGLO-ITALIAN AGREEMENT

To the Editor of THE SCOTSMAN, *20 January 1937*

It may be feared that Italy has a perfect right to repudiate Mr. Eden's apparent claim that there is nothing in the Anglo-Italian agreement entitling either Power to intervene in Spain, whatever the complexion of the Government in any part of the country may be, and that the agreement cannot possibly be interpreted in the sense given to it by the Foreign Secretary.

The text of the agreement is, in fact, conclusive against Mr. Eden's interpretation. It runs in its essential part: 'So far as Italy is concerned, the integrity of the present territories of Spain shall in all circumstances remain intact and unmodified.' This quite plainly leaves it within the unfettered discretion of Italy to refuse to permit the establishment of a Government deemed Bolshevist in any part of Spain, without in any way departing from the terms of the Notes exchanged on December 31. Nor need we doubt that Germany and Italy are pledged to prevent such an eventuality. It is more and more clear that the declaration and the Notes have no real value, because they were concluded between two parties who were never at one in their intentions.

[1] Mr. de Valera did not act until Feb. 18, when he brought forward the measure which became the Spanish Civil War (Non-Intervention) Act, 1937. The insincerity of the opposition's allegation of desire to work with Britain was conspicuously shown by its effort to secure recognition of General Franco's régime based on Italian and German support, the triumph of which would gravely menace Britain.

I hope that Mr. Eden will be pressed to state his view of the meaning of the Notes, and will also be asked to explain his attitude to the use of British ships and ports in the conveyance of the Irish supporters of the insurgents to Spain. To ignore this point seems inexcusable.

The manifesto of Spanish Catholics[1] in your issue of to-day ought to do something to destroy the prevalent delusion that a war waged mainly by Moroccans and foreigners is a holy war to establish Christianity in Spain.

18. THE BILBAO BLOCKADE

To the Editor of THE SCOTSMAN, *13 April 1937*

1. Mr. Baldwin's excellent qualities do not include familiarity with law. That has been sufficiently shown, in the national sphere by the failure to obtain legal sanction for the new Coronation Oath, and in the international sphere it becomes patent when he says that His Majesty's Government 'cannot recognize or concede belligerent rights', but proceeds to explain that they had warned British ships not to go to the Bilbao area, and adds a plain intimation that British seamen would be entitled to refuse to serve on ships whose owners disregarded the warning. International law is made by deeds, not by paper protests, and it is perfectly clear that this is recognition of a blockade. Moreover, Mr. Baldwin is going further than has been the attitude of Britain in the past regarding regular

[1] A conclusive denunciation of the insurgents' destruction of churches and massacre of priests, nuns, women and children at Durango (March 31) and Guernica (April 26) was presented to the Pope by the clergy of the diocese; *The Times*, June 11, 1937. The Basque reverses were due to Italian and German aviators, introduced into Spain despite the promises of Italy and Germany, which as usual served to induce continuance of surrender of British interests (cf. Sir N. Angell, *The Defence of the Empire*).

blockades. He is condemning any attempt to run the blockade as one to be resisted by seamen even if the owners of the ships are willing to take the risk.[1]

2. I confess I cannot understand the suggestion that there might be doubt whether according protection in territorial waters to British shipping would be defensible. So long as belligerent rights are not conferred, the naval forces of General Franco are merely pirates *jure gentium*, and it is within the undisputed right of Britain to protect her ships desirous of entering the ports of a State with which she is on friendly terms and which invites such entry, assuring such ships of protection within territorial waters.

3. In normal circumstances it would be entirely for the British Government to decide whether it would afford protection to British ships against pirates, but the matter is complicated by the non-intervention agreement. It is argued that to protect ships is to take sides against General Franco, but it seems clear that to refuse protection is an active and deliberate breach of the non-intervention agreement in favour of General Franco. From the action taken it is plain that he can close any Spanish port he pleases by laying mines and sending out warnings that British ships found in territorial waters will be seized or sunk.

4. What has happened is what I feared would be the case, when in your issue of November 25[2] I pointed out

[1] The success of several British ships in entering showed that Britain had exaggerated the danger. The Government, however, did refuse assent to Franco's demand that it should accept a six-mile limit for territorial waters, and escorted refugees by sea. On the other hand, it displayed much weakness in respect to the injury and loss of life caused to H.M.S. *Hunter* by an insurgent mine on the high seas, and to the seizure and confiscation of British subjects' property as prize. See Mr. Eden's damaging admissions, House of Commons, June 23.

[2] See no. 13, *ante*, and no. 22, *post*.

the failure of the British Government, in adopting its policy of prohibiting the conveyance of munitions to Spain, to make it absolutely clear that its action in this regard was accompanied by determination to secure free access by British ships with innocent cargo to ports in the hands of the Spanish Government. The rebels have taken advantage of the omission, as they did of the unaccountable failure of the Foreign Office to move in the matter of enforcement of the Foreign Enlistment Act until General O'Duffy's men had safely arrived at their destination.[1]

5. It is very difficult to see why Mr. Baldwin should insist so strongly on the refusal of belligerent rights. Legally, everything now seems to point to the propriety of concession. The rebels, recognized and aided by Germany and Italy, have certainly attained such a position that recognition would be internationally justifiable. The deciding issue should be British interests, especially in the field of shipping, and belligerent rights would place matters on a regular basis. Such recognition could not possibly be deemed intervention; no one has suggested that the non-intervention agreement forbids that.

6. Mr. Eden has consoled us with the belief that even if the rebels win, Spain will not remain subject to Italian control. This pleasing optimism is painfully reminiscent of the Inter-Departmental Committee's view that no vital British interests were involved in the acquisition by Italy of control over Abyssinia.[2] Does it not occur to him that Signor Mussolini might not have much difficulty in persuading General Franco

[1] See no. 16, *ante*. The brigade returned after a singularly inglorious career in June, being the first unit to withdraw.

[2] Keith, *Letters on Current Imperial and International Problems*, 1935–6, pp. 162, 163.

that an ideal opportunity had arrived for securing the return to Spain of Gibraltar? Does Mr. Eden forget that many Spanish patriots do not share his view of the unquestioned right of Britain to hold that fortress, and that they might perfectly well be willing to aid Italy to obtain control over the entrance to the Mediterranean? He must have noted Italy's bid for Egyptian friendship and Arab aid in her ambitions.

19. THE INTERNATIONAL SITUATION: BILBAO AND AFTER

To the Editor of THE SCOTSMAN, *25 June 1937*

General Franco's success at Bilbao must doubtless have strengthened the readiness of Germany to work with Italy, but the essential motive must surely be found in the clear negation by the Imperial Conference of any British concession to German territorial ambitions, and the fact that this view is obviously, for different but undoubtedly cogent reasons, supported by the various political parties in the United Kingdom.

We must therefore be definitely prepared for German hostility and willingness to strike at our interests in every quarter, and there is none so obvious as the undermining of our position in the Mediterranean by support of the Spanish insurgents. General Franco has been admirably candid on the issue of Gibraltar in saying: 'Gibraltar could not be the root cause of an anti-British policy in Spain. For England, Gibraltar has lost much of its importance.' It is, in fact, perfectly clear that a Nationalist Government in Spain, which is successful with Italian and German support, will ruin the British position in the Western Mediterranean, and do infinitely more harm to Britain than the presence of

Germany in Tanganyika, which we are prepared to prevent even at the cost of hostilities.

The obvious conclusion is that we must not permit Germany and Italy to violate the non-intervention agreement and to destroy with the aid of the insurgents the Valencia Government, for, if that takes place, Spanish policy will be enlisted in the support of two Powers, both of them manifestly hostile. Whether, however, our Government will make it clear to Germany and Italy that it cannot acquiesce in their control of Spain, or will be satisfied with feeble protests and appeals, only time will show.[1] But there is undoubtedly a widespread belief in Europe that Britain may safely be counted upon to give way rather than risk war, and a belief of that kind is always a dangerous thing. To escape immediate difficulties by surrendering vital positions is probably popular, but it is hardly statesmanlike.

20. THE DUCE AGAINST BRITAIN

To the Editor of THE SCOTSMAN, *2 July 1937*

1. Signor Mussolini's latest pronouncement should remove even the most obstinate delusion as to his

[1] The statement of Mr. Eden in the Commons on this date that Britain was seeking peace at almost any price, and the efforts of the Prime Minister to secure silence lest criticism annoy Herr Hitler and Signor Mussolini, suggest fundamental weakness, material and moral, in Britain, and must invite further aggression. It can only be presumed that the defences of the country are in a parlous condition; though on June 28 Sir Thomas Inskip insisted on British preparedness, Army recruiting is bad. The response of Herr Hitler and Signor Mussolini to Mr. Chamberlain's conciliatory remarks indicates their confidence in the negligibility of Britain as an obstacle to their domination of the situation, and their congratulations to General Franco on the capture through the aid of their arms of Bilbao and his replies show him as essentially an Italian protégé.

hostility to Britain, manifested so clearly in that propaganda in Palestine and Arabia to which Mr. Eden has been compelled, as stated in the Commons on June 28, to take strong exception. His hostility is inevitable and natural; he desires for Italy control of the Mediterranean and security for her African Empire as well as its expansion. Britain in the Mediterranean, in Egypt, and in Palestine offers the gravest obstacle to his ambitions, and to weaken her by obtaining control over Spain through his loyal ally General Franco is perfectly sound tactics. There is nothing new in Italian imperialism: in 1888 Lord Salisbury deliberately used the British squadron to rescue Zanzibar from the 'cynical and arrogant injustice' of Crispi's policy, and in 1890 that great Conservative statesman effectively negatived the Italian project of invading Tripoli in time of complete peace and without the shadow of an excuse. It was not until 1911 that Italy, having bribed France by the promise of a free hand in Morocco, attacked Turkey, and started a train of events leading to the Great War.

2. One point made by Signor Mussolini demands a British reply. It is categorically asserted that in August last Britain said that she had no means of stopping volunteers. Mr. Eden really ought to be asked whether this is true or not. In November and December last you were so good as to publish a number of letters in which I asked why no steps were being taken under the Foreign Enlistment Act, 1870, against the use of British ports by General O'Duffy's brigade, and it was only in January that the British Government took the step I had urged of calling attention to the terms of the Act.[1] Nor, when at long last a member of Parliament asked

[1] See no. 16, *ante*.

a question as to the case of the brigade, was Sir J. Simon's reply definite as to date.

3. It is plainly admitted that the dispatch of volunteers—so-called—to Spain proceeded until some time in February. This confirms the strong view which I expressed in your columns at the time of the worthlessness of the accord with Italy on December 31 on which Mr. Eden prided himself.[1]

4. We have done our best to conciliate Italy by breaking our obligations under Articles 10 and 16 of the League Covenant; by taking the lead in the removal of sanctions; and by recognizing—in flat defiance of the Covenant and of the resolution of the League Assembly of March 11, 1932—the Italian Government as the Government *de facto* of Ethiopia with all the powers of a Government *de jure*. I confess I feel some difficulty in reconciling with national honour this disregard of our duty 'not to recognize any situation . . . which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris'. I do not, however, know that we can do anything further. Formally to recognize the annexation of Ethiopia would involve His Majesty's personal action in a flagrant international wrong. We cannot admit that our interest in the Mediterranean is secondary or weaken our hold on Egypt or Palestine,[2] though His Majesty's Official Coronation Programme went so far as to disclaim any interest in the Sudan.[3]

[1] See no. 17, *ante*.

[2] The appearance of the Royal Commission's Report affords conclusive justification for the criticisms of the incompatibility of the pledges to the Arabs and the Jews urged in Keith, *Letters on Imperial Relations*, 1916–35, pp. 319, 320; *Letters on Current Imperial and International Problems*, 1935–6, pp. 101–19, 222. The solution of partition is a complete admission of utter failure, but must be deemed the only way of not perpetrating even graver injustice.

[3] See no. 3, *ante*.

5. Germany in my opinion has far better reason for resentment of our insistence on keeping our conquests, and common sense still seems to me to dictate conciliation of that Power on condition that she abandons territorial aims in Europe and aid to General Franco, which Herr Hitler is patently according in revenge for our refusal to consider his colonial claims. But, if we cannot make any concession, then at least I hope we shall not be guilty of the folly of allowing Spain to become a dependency of Italy.

21. MR. EDEN AND THE RECOGNITION OF BELLIGERENCY

To the Editor of THE SCOTSMAN, *15 July 1937*

1. The chief merit, it may be held, of the British proposal of conditional recognition of belligerency in Spain is that it would prevent a recurrence of the scene of yesterday, when Conservative members of Parliament cheered the announcement of the capture in territorial waters of a British ship proceeding to a port in the hands of the Spanish Government, recognized as a friendly Government by the King. The position of General Franco's forces at present is that of pirates *jure gentium*, and that Conservative members, whatever their religious feelings, should exult in the capture of a British ship by pirates is singularly un-English. The discredit of the scene was added to by the failure of Mr. Duff Cooper forthwith to make it clear that these piratical vessels would not be allowed to attack British ships, lawfully in Spanish territorial waters, from the high seas.

2. It does not appear to be realized that these British ships are offending neither international nor British

law. They are engaged in wholly lawful and profitable occupations, in accordance with the honourable traditions of enterprise which have created so much of British wealth. If the British Government disapproves their exercise of legal rights, it has an overwhelming majority in Parliament and can forbid their action. The absurdity of Mr. Duff Cooper's position is accentuated by the fact that he stated that we reserved the right to demand reparations if any wrong were done to British subjects. The spectacle of asking pirates who have no international status for redress, and the whole contention that territorial waters and the mainland are the same thing, prove that Mr. Duff Cooper is indeed unable to give any legal opinion.

3. In your issue of August 24, 1936,[1] I pointed out the case for belligerent rights being accorded, and called attention to the Italian proposal to prevent, as required under such recognition, the supply of arms and aeroplanes and the enlistment of volunteers. Would it not have been better then to accept belligerency? Have we gained anything by preferring the non-intervention agreement, a new idea in international law, which has been shamelessly violated? It is perfectly true that insurgents never have a right to recognition, as some Conservative members of Parliament think, but even in August General Franco was qualified to be recognized if British interests dictated. Whether now withdrawal of volunteers is possible, no one, I suppose, can really say, and the British Government has by its proposal virtually bound itself not to recognize belligerency except on conditions of withdrawal. These are the difficulties into which Governments fall when they depart from the recognized rules of law.

[1] See no. 12, *ante*.

4. General Franco has lost no time in making good his statement, on which I commented in your issue of June 26,[1] that 'For England Gibraltar has lost much of its importance'. He has violated the long understanding, faithfully observed by Spain even in the war with the United States, that batteries shall not be mounted to command Gibraltar. No one can pretend that his action is directed against the Government of Valencia. It is simply a menace, like his threat of commercial discrimination,[2] and it indicates clearly how dangerous will be our position in the Mediterranean if he and his patron, Signor Mussolini, secure final control of Spain. It is gratifying to note that even the Right in France is now alive to the fatal result of allowing Italy to dominate the Mediterranean and sever France's connexions with her supply of man-power in North Africa.

22. THE REFUSAL TO PROTECT BRITISH SHIPPING

To the Editor of THE SCOTSMAN, *16 July 1937*

With all deference to the kindly explanation suggested by your Parliamentary correspondent, I fear that, like Sir Archibald Sinclair, and the late Mr. Joseph Chamberlain, I can find no excuse for 'loud laughter' at a national humiliation.

The halting phrases of Mr. Duff Cooper, 'A foreign ship has not fired at a British ship', and of the Civil Lord, 'This ship was not attacked. She was brought to', cannot conceal the facts. The *Molton* while close to land was compelled to surrender to the *Almirante Cervera* by warning shells, and to proceed to an un-

[1] See no. 19, *ante*.

[2] On July 6 General Franco had demanded recognition on pain of economic hostility. German support had been encouraged by assurances of access to iron ores from Bilbao.

known destination. The insurgent warship was ten miles off shore, and H.M.S. *Royal Oak* was present. The spectacle of a British warship placidly contemplating the piratical seizure of a British vessel, proceeding to a friendly port to evacuate refugees, is unparalleled in the long and glorious history of the navy, and is deeply humiliating.[1]

When the British Government announced that it would protect British shipping on the high seas but not in territorial waters, it was clearly understood that it meant that it would not send British warships into territorial waters or from the high seas attack insurgent vessels which in territorial waters were operating against British merchant vessels. No one would have believed that the British Government contemplated allowing insurgent vessels to shell British ships from the high seas. We must now understand that this is the case, and that a further inroad has been deliberately made on normal rights, and one which, in view of the steady increase in the range of artillery, is of the most dangerous type.

The whole episode illustrates the lack of wisdom shown in departing from the established rules of international law in favour of the non-intervention agreement. To claim that it has prevented war is to ignore the fact that neither Italy nor Germany is at present prepared for hostilities on a European scale, and that the true reason for the maintenance of peace lies therein.

[1] The most singular feature of modern England is the conversion of Conservatives to pacifism 'at almost any price', to discouragement of enterprise, and to assertion of reluctance to go to war which, as Viscount Cecil has insisted, gravely increases the risks of war induced by foreign belief that Britain will never fight. Labour has been aroused to the folly of this position, but is hampered by its former ideals, still cherished by Lord Ponsonby and Mr. Lansbury.

23. THE SURRENDER OF BRITISH MARITIME RIGHTS AND THE PEACE TERMS OF GERMANY AND ITALY

18 September 1937

The Nyon Arrangements have been necessitated by the folly of repeated surrender of British maritime rights. We acquiesced (1) in the capture of British vessels by insurgent warships operating in territorial waters; (2) in their use of force from the high seas to compel surrender of British ships in territorial waters; and (3) in the control in transit through the high seas of vessels thus captured. To defend the first concession under the Non-Intervention Agreement was possible; the other two were inexcusable. No wonder that the insurgents proceeded to wholesale use of aircraft and submarines to attack British and other vessels on the high seas with complete indifference to the restrictions of the rule of international law, formally asserted for submarines by the protocol of London of November 6, 1936, which demands that the crew of merchant ships must be placed in safety before they are sunk by belligerents.

When British ships were assailed and captured on the high seas, and when H.M.S. *Havock* was narrowly missed by a torpedo, the normal British reply would have been a blockade of the ports in the hands of the insurgents until they abandoned their attacks. The Nyon Arrangements place on Britain and France the burden of an elaborate patrol, though they empower them to attack piratical vessels disregarding the rules of war, if caught in the act or immediately thereafter. But, despite the assertion that belligerent rights are not accorded, Italy has stressed as virtual proof of admission of belligerency the fact that Spanish governmental

vessels are denied protection, and that no right of action is conceded against ships which obey the rules of war. It seems at least urgently necessary for the British Government to make it clear that its ships are instructed to destroy any insurgent vessel which attacks, even according to rule, British ships on the high seas. Insurgents, while unrecognized, are pirates pure and simple.

Still, Nyon suggests that Britain is realizing that the peace terms of the Dictators are too onerous for acceptance. (1) Italy demands recognition of the conquest of Ethiopia and relies on Mr. Chamberlain to complete the destruction of that power which he carried so far by the cessation of sanctions. This means, failing amendment of the Covenant, deliberate repudiation of Article 10 and of the binding force of international law. Is Britain prepared to act so dishonourably? (2) Italy and Germany demand recognition of General Franco and acquiescence in their grant of aid to him to destroy the legitimate Government of Spain. General Franco has already broken the rule that no batteries should be erected which might possibly menace Gibraltar, and has made it clear that he expects its cession. Are we prepared to see Italy with her client state, Spain, dominant in the Mediterranean and to concede the Duce's claim that that sea is to Italy *vita*, to us and to France mere *via*?

Mr. Chamberlain's eagerness to re-establish cordial relations with Italy has so far merely elicited fresh Italian demands, and now the Duce's deliberate adherence to Herr Hitler's demand for the restoration of the German colonies. Does this not suggest that Britain would do better in seeking to prevent the dangerous alliance of Germany and Italy by meeting fairly

German claims rather than by further concessions to Italian intransigence? Mr. te Water, by a calculated indiscretion, has suggested a conference to discuss German claims, and Herr Hitler has once more disclaimed naval rivalry and any desire to create naval bases. Is Britain to imitate the action of France,[1] whose intransigence destroyed the German offer of limited rearmament on December 18, 1933, and rendered inevitable Germany's repudiation of the Treaty of Versailles? Is Britain to be the one Power to retain undiminished the *spolia belli*, and to refuse any contribution to European appeasement? If she makes a fair offer to Germany in return for her renunciation of her hostility to Spain and her co-operation with the Western Powers in a just settlement of difficulties in Europe, and it is refused, then on Germany will rest the responsibility which now falls on Britain.

Without some adjustment of the colonial issue, peace, Herr Hitler assures us, cannot settle on Europe, nor, it may be added, will grave friction cease among the Nazis of South-West Africa who have not forgotten General Hertzog's assurance that it would rest with them in due course to decide their political future, General Smuts's repeated demands for the revision of the Treaty of Versailles, and Mr. Pirow's effusive welcome of the return of Germany to Africa. We cannot expect Germany to be satisfied with the Cameroons and Togoland, but other readjustments are possible, and Portugal—now an ally of Germany—is patently incapable of development of her territories.

[1] Parl. Pap. Cmd. 4559.

24. ARAB RIGHTS IN PALESTINE

18 September 1937

The Arab case against partition deserves fairer treatment than it has been accorded. (1) All the efforts of Jewish apologists failed to convince the Royal Commission, no friend of the Arabs, that the British pledges excluded Palestine. The latest protagonist of the Jewish cause, Mr. C. Asquith, is compelled to admit that Britain did first promise Transjordan to the Arabs, and then to the Jews. In face of this admitted bad faith, can any Arab be expected to accept Sir H. McMahon's claim that his letter of October 24, 1915, was intended to reserve Palestine, and that the Emir Husein so understood it? The latter statement contradicts far better evidence, and it is clear that, if it was intended to exclude Palestine, good faith demanded that it should be done in plain words. (2) The mandate was utterly inconsistent with the declaration of November 7, 1918, promising enfranchisement and the establishment of national governments based on the free choice of the people. (3) The inconsistency was asserted by a decisive majority by the House of Lords, despite all governmental efforts, in June 1922.[1] (4) The Jews, in their tentative willingness to accept partition, demand control of the Negeb and western Jerusalem, claims which even so convinced a Zionist as Mr. Ormsby Gore dare not support.

Yet the Arabs should remember that right is insufficient protection, as Ethiopia learned at bitter cost, and that, despite the military and political folly of locking up troops in Palestine when we are driven to the lowering of conditions of recruiting and the deple-

[1] Keith, *Letters on Current Imperial and International problems*, 1935–6, pp. 101–18.

tion of the reserve by inviting re-enlistment, Britain, which has given pledges—however wrongly—to the Jews, might feel bound to enforce the mandate by martial law under the Orders in Council of 1931–7, which confer on the executive the most dangerous plenitude of power and forbid judicial control in a manner which at one time would have raised vehement protests from lovers of the rule of law. They would do well to concentrate their efforts on securing just boundaries; the grant from the Jewish State and Britain of resources to develop the unfertile lands assigned to them; and protection for their fellow countrymen committed to the doubtful mercies of the Jewish State.

25. TWO QUESTIONS FOR MR. EDEN

To the Editor of THE SCOTSMAN, *21 September 1937.*

Two questions to Mr. Eden are suggested by the reports in your issue of to-day.

(1) Does he expect Germans to credit his assertion that war can confer no permanent benefit on the nation that wins, when they see Britain and the Dominions in control of over 870,000 square miles of territories won in the last war, not a foot of which are they willing to surrender? Offers to discuss raw-material supplies for Germany are worthless, as Mr. Eden is perfectly well aware.

(2) Why does he instruct Mr. Howe to declare that the Japanese Government must be held responsible if any Britons are killed or British property damaged as the result of aerial attacks on Nanking? Does he really believe that he could present a tenable case under international law for any demands for compensation, or that he would ever obtain compensation from

Japan? Common sense and humanity alike demand that the clearest warning be given to British subjects that they stay in Nanking at their own risk. The action of the United States in the withdrawal of its citizens from imminent danger should be commended. and it is a matter for very serious consideration whether the personnel of the British embassy and their dependants should be required to run grave risks.[1]

[1] Japan's action is clearly within the rules of existing international law; Wheaton, *International Law* (ed. Keith), ii. 904, 905.

INDEX

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